traditional State purview in such cases must give way as a matter of "substantive due process".

Furthermore, in point of both substantive du process and equal protection, is this prosecution, is this application of the Hobbs Act, a justified exercise of the federal power to punish crime, in the light of the particular prosecutive facts *aside from interstate commerce aspects?* Is it seemly, is it consistent with decent administration of federal criminal justice, for the prestige and authority of the United States Government to be hurled into such a dismal and undignified prosecutive affray as this record reveals? What a dismal and undignified thing it is for the United States of America to invoke the powers of the federal Court System in support of "Hobbs Act extortion" charges based on the unpalatable testimony of a Leonard and a Ruth Caron. Consider the several constitutionally unattractive things that the federal prosecutive personnel in this case had to do to make this into a "federal case". They had to vouch for the execrable credibility of Leonard and Ruth Caron and, specifically so, on the issue of "reasonable fear". In vouching for Leonard Caron's reasonable fear, the Government had to palm off Caron before a federal Judge and jury as a timid, well-behaved fellow terrorized by men of evil reputation, in face of the facts of Caron's own mad-dog business aggressiveness and his resort to extortionist-terror threats far worse than anything charged against these defendants in this record (*i.e.*, Caron's $5000 "stop-Carbone" threat).

In so asking a federal District Court to apply the Hobbs Act in this case, was the Government serving a legitimate Congressional object of protecting interstate commerce against extortion by threat or fear, was the Government complying with the substantive due process requirement that such legitimate Congressional object be

accomplished only by means which are reasonably adapted to the accomplishing of a permitted legislative object? Or, was the Government here acting in accordance with the equal protection of the laws, when it essayed this cynically discriminatory enforcement of the Hobbs Act, in that the Government here shielded and then used for its purposes a self-confessed terrorist and extortionist (Caron, who admits he threatened to pay $5000 to terrorize Joseph Carbone in a situation unconnected with this indictment or with these defendants), to prosecute the within defendants on the claim that Caron is a timid creature whom the defendants could terrify—and it being remembered that while Caron has admitted under oath the $5000 incident with Joseph Carbone, the petitioner herein is steadfastly denying his guilt of these indictment charges?

V

The Conspiracy Count Issues

(1) The conspiracy conviction is a nullity as a matter of law because of the anomaly of an indictment for conspiracy to attempt to extort, and the collapse of the overt act allegations. It seems self-evident that a charge of *conspiracy to attempt to extort* is inconceivable and gives rise to a manifest legal anomaly that would render any such conspiracy charge void simply for failure to charge an offense. Yet that is exactly how the conspiracy count in this indictment (count 4) reads ("by extortion and attempted extortion of propery belonging to the Caron Refuse Removal, Inc.", etc.).

How do we know whether the jury convicted for conspiracy looking to "extortion", or for conspiracy looking to "attempted extortion"? The Court's instruction to the jury left it unrestrainedly open to the jury to convict on

either or both of these bases (1687a, 1692a-1694a, 1703a-1716a, and 1796a *et seq passim*). See again the *Leary* case quoted at p. 43, *supra*. And see *United States* v. *Robbins*, 354 F. 2d 741 (C. A. 2, 1965), reversing a conviction in a closely similar situation involving two indictment issues that had been "presented [to the jury] in the alternative", the Court stating "it is impossible to ascertain the exact basis for appellant's conviction" (354 F. 2d at p. 742). For all that appears, Tropiano was convicted for the non-existent and inconceivable crime of *conspiracy to attempt to extort.*

Furthermore, the only two overt acts in the conspiracy count are that the defendants attended the BIRCA April 7, 1967 meeting (overt act 1), and that at said meeting Tropiano and Grasso "threatened those present at the meeting with physical violence in the event that they sought to compete with the C & A Refuse Removal Company in Milford, Connecticut" (overt act 2). As seen, the Government's proofs as to any such threats by defendants at the BIRCA meeting collapsed so abysmally that the prosecutor practically abandoned this entire phase of the case in his summation (p. 27, *supra*). This collapse of the BIRCA meeting proofs wiped out overt act 2, and with overt act 2 wiped out, no further prosecutive significance could attach to the innocuous overt act 1 allegation that the defendants attended the BIRCA meeting. Whereupon, we are confronted with the even more incredible anomaly of a *conspiracy to attempt to extort with no effectively charged act left in the case as having been done in furtherance of such conspiracy to attempt.*

Our above argument* is not precluded by the concurrent nature of the sentences under the substantive and conspir-

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* Likewise our arguments under (2) and (3), *infra*, in this "Reason" V.

acy counts. *Benton* v. *Maryland,* —— U. S. ——, 23 L. Ed. d 707. Nor is the argument precluded by any supposed lack of need for overt act allegations in a Hobbs Act conspiracy case. We have found no authoritative ruling that overt act allegations are unnecessary in a Hobbs Act conspiracy indictment.*

(2) Fair trial was denied by the Court's failure to instruct the jury under the conspiracy count as to scienter of the interstate commerce aspects.

Notwithstanding decisions like *United States* v. *Amabile,* 395 F. 2d 47 (C. A. 7, 1968); *United States* v. *Varlack,* 225 F. 2d 665 (C. A. 2, 1955); or *Carbo* v. *United States,* 314 F. 2d 718 C. A. 9, 1963), cert. denied 377 U. S, 953, we urge that there ought to be applied, under Hobbs Act *conspiracy* law, the well settled principle applied in conspiracy prosecutions under the various federal "stolen property" "receiving" prohibitions, that the Government must prove the defendants' scienter of the "interstate" character and purpose of the alleged conspiracy. E.g., *Davidson* v. *United States,* 61 F. 2d 25 (C. C. A. 8, 1932) (the leading early case for this point); *United States* v. *Patrisso,* 262 F. 2d 194, 196 (C. A. 2, 1958); *United States* v. *Cordo,* 186 F. 2d 144, 147 (C. A.

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* We are not overlooking the decision (*dictum?*) of the District Court in *United States* v. *Callanan,* 173 F. Supp. 98, 101 (E. D. Mo. 1959), affirmed 274 F. 2d 601, affirmed 364 U. S. 587, where the authorities cited do not seem to us to support the conclusion reached. In any event, it does not seem conceivable, in due process terms, that, where the indictment has been brought on an overt act theory, the Court has instructed the jury on that theory, and the jury has convicted on that theory, a conspiracy count ultimately found defective because of collapse of the overt act allegations, could be salvaged on some *ex post facto* theory of no need for overt acts.

2, 1951), cert. den. 340 U. S. 952; *United States* v. *Smolin*, 182 F. 2d 782, 786 (C. A. 2, 1950); *United States* v. *Sherman*, 171 F. 2d 619, 623-624 (C. A. 2, 1948). This scienter rule in the conspiracy area of the Federal stolen property legislation is to be distinguished from the rule as to scienter for the substantive offense. E.g., *Rosen* v. *United States*, 271 Fed. 651 (C. C. A. 2, 1920). This Court appears to have recognized the distinction. *Pereira* v. *United States*, 347 U. S. 1, 12.

And we respectfully add that the requirement of scienter of interstate commerce which we are here urging, is favored by the consideration, mentioned earlier herein in other connections, that the high-water mark reach of the Hobbs Act both in terms of the commerce power* and substantive due process reasonableness, as well as fair due process apprisal of the statutory coverage for the benefit of potential defendants, make it necessary and fair that parties should have the protection, on the question of "intent" to violate the Hobbs Act, of knowing that they are not going to be swept from the area of State-law "extortion" into the area of Hobbs Act "extortion", in a *conspiracy* case, unless there is proof of their scienter of the Hobbs Act interstate commerce *conspiracy* intent.

(3) Counts 1 and 4 are duplicitous. Tropiano has been subjected to double punishment for a single offense. Despite the concurrent nature of the sentences herein under the substantive (Count 1) and conspiracy (Count 4) counts, we submit that, in view of recent decisions (*infra*), all practical distinction as to methods of proof under conspiracy and substantive counts involving the same subject matter has been obliterated, so that the jus-

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* Especially the commerce power *as here applied* (*supra*).

tification for permitting such dual charges (the justification that the Government needs the conspiracy proof procedures to obtain admission of evidence not admissible under substantive counts), no longer exists, and the only real result of allowing such dual charges is double or multiple punishment for a single offense. The decisions to which we refer, as having practically obliterated former distinctions in permitted methods of proving conspiracy and substantive charges, are *United States* v. *Stadter*, 336 F. 2d 326 (C. A. 2, 1964), cert. denied 380 U. S. 945; *United States* v. *Nuccio*, 373 F. 2d 168 (C. A. 2, 1967), cert. denied 387 U. S. 906; *United States* v. *Ragland*, 375 F. 2d 471 (C. A. 2, 1967). The above considerations are believed to render distinguishable the five-to-four decision in *Callanan* v. *United States*, 364 U. S. 587 (1961), which held that Hobbs Act substantive and conspiracy offenses are separate and distinct offenses.

VI

The "Bruton" Issue

Our listing of this as the last of our "Reasons" is not to be taken as a minimizing. Quite to the contrary. We respectfully join with utmost earnestness, and we rest upon, the presentation on this point in the companion petition of Grasso, No. 1101, this Term, at pp. 15-22.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

ABRAHAM GLASSER
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 702-3-4—September Term, 1968.

(Argued July 24, 1969 Decided November 26, 1969.)

Docket Nos. 33092-3-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

RALPH "WHITEY" TROPIANO, LAWRENCE R. PELLEGRINO and WILLIAM GRASSO,

Defendants-Appellants.

Before:

WATERMAN and HAYS, *Circuit Judges,*
BARTELS, *District Judge.**

Appeal from a judgment of the United States District Court for the District of Connecticut, Timbers, *J.*, convicting the defendants of violations of the Hobbs Act, 18 U.S.C.A. §1951. Affirmed.

J. DANIEL SAGARIN, Assistant United States Attorney (Stewart H. Jones, United States Attorney, District of Connecticut, on the brief), *for appellee.*

* Of the Eastern District of New York, sitting by designation.

ABRAHAM GLASSER, New York, N. Y., *for appellant Ralph "Whitey" Tropiano.*

HOWARD T. OWENS, JR., Bridgeport, Connecticut (Owens & Schine, Bridgeport, Connecticut, on the brief), *for appellant Lawrence Pellegrino.*

IRA B. GRUDBERG, New Haven, Connecticut (Jacobs, Jacobs, Grudberg & Clifford, New Haven, Connecticut, on the brief), *for appellant William Grasso.*

BARTELS, *District Judge*:

On March 27, 1968, the appellants were indicted in New Haven, Connecticut, in a four-count indictment, charging them with wilfully and knowingly attempting to and actually obstructing, delaying and affecting interstate commerce and the movement of supplies from outside Connecticut by extorting and attempting to extort property from certain refuse removal dealers by the wrongful use of threatened force, violence and fear, in violation of the Hobbs Act, 18 U.S.C.A. §1951.[1] Counts 1, 2 and 3 of the indictment

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1 The pertinent portions of Section 1951 read as follows:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all

charged substantive violations of the Hobbs Act, while Count 4 charged conspiracy under the same Act. Tropiano and Grasso were named only in Counts 1, 2, and 4, while Pellegrino was named in all counts. The Court ordered an acquittal of all appellants as to Count 2, and a severance as to Count 3 relating to Pellegrino alone.

After a trial of eighteen days, the jury on November 15, 1968, returned a verdict of guilty against all the appellants accused in Count 1, and against all, except Pellegrino, accused in Count 4—the conspiracy charge. Tropiano was sentenced to twelve years imprisonment on each count, to be served concurrently, and a $10,000 fine on Count 1; Grasso was sentenced to ten years imprisonment on each count, to be served concurrently, and a $7,500 fine on Count 1; and Pellegrino was sentenced to eight years imprisonment and a $5,000 fine on Count 1.

It is undisputed that Tropiano and Grasso together with Dolores Proto were partners in the C & A Refuse Removal Company (hereafter C & A), engaged in the business of collecting rubbish, with customers or "stops" in Milford, Connecticut; that Pellegrino was likewise engaged through B & L Carting Corporation in Bridgeport, Connecticut; and that Leonard Caron, with the help of his wife Ruth, ran a family-owned company under the name of Caron Refuse Removal, Inc., similarly engaged in the rubbish removal business in the Bridgeport area.

The thrust of the Government's case was that when Caron's company replaced C & A in servicing one or more of the C & A's Milford "stops," Tropiano, Grasso and Pel-

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commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

legrino, by threats of violence, forced Caron to cease and desist from attempting to take away any more C & A's Milford "stops" and to consent not to solicit any more business in that area. This contention rested almost entirely upon the testimony of Leonard Caron, supported in parts by the testimony of his wife and corroborated in peripheral areas by several other witnesses. The appellants charge, among other things, that the testimony of Caron and his wife was incredible as a matter of law. It is thus in order to examine this testimony which, in essence, reveals the following:

Jo-Nick's and Milford Rivet "Stops"

Caron moved to Milford in 1966 and decided that he would begin servicing Milford private refuse removal customers. At first he serviced two or three "virgin" accounts which had not been previously serviced. Then late in February, 1967, he began servicing the grocery store by the name of Jo-Nick's, located a block from his home, which prior thereto had been serviced by C & A. Thereafter, on March 2, 1967, Caron received a telephone call from Pellegrino, a competitor, at which time the latter stated that Grasso and Tropiano wished to speak to him. Caron invited them to his home but Pellegrino declined, arranging, instead, a meeting at Howard Johnson's restaurant for that evening. Pellegrino picked up Caron in his car and drove him to the restaurant, where Pellegrino introduced Tropiano and Grasso as owners of C & A and also as Pellegrino's partners and backers. At this meeting Grasso said that Jo-Nick's was his account, that Caron should leave it alone and that if Caron did not cooperate, Grasso would push him out of Milford—"way out if he needed to," and Tropiano said "We know how to take care of guys like you."

Caron refused to accede. On the way home Pellegrino told Caron that he was crazy and that "these two men were not to be fooled with," that Caron was liable to get his "head broke or something similar to that." Two days later, on March 4th, Caron and his wife sought the advice of Lieutenant Donald Paige of the Connecticut State Police in Fairfield. Caron shortly thereafter removed the refuse container he had left at Jo-Nick's and discontinued service for approximately two weeks, until the middle of March, when he again resumed service of Jo-Nick's. The resumption of service resulted in a storm of phone calls from Grasso and Pellegrino, during which Grasso kept repeating that the customer was his and that Caron should keep away. Pellegrino again stated that Caron was "fooling with the wrong people." In one call Pellegrino told Mrs. Caron that her husband "was playing with a rough bunch of guys" and that she should tell him "to lay off before he got hurt."

By late March, Milford Rivet Company discontinued its arrangement of service in Milford with C & A and awarded the business to Caron, who began servicing the company on April 1, 1967. Grasso then attempted to induce other refuse removal dealers to exert pressure upon Caron to cease and desist his Milford activities. Accordingly, on April 3rd Grasso and Pellegrino visited Peter Bertase, who with his son-in-law William Lockwood was the owner of Call Peter, Inc., also in the refuse removal business. Grasso advised Bertase, "If I don't get (the stops) back, I'm going to do something about it" or "there would be trouble." He ordered Bertase to call Caron, which he did, attempting to induce Caron to surrender the "stop." Bertase informed Caron that he had a similar problem with Grasso when Bertase had taken five accounts from C & A and "out of five I got one. I gave four back."

The BIRCA Meeting of April 7, 1967

Bridgeport Independent Refuse Collectors' Association (BIRCA) is a refuse collectors' trade and social organization in and around Bridgeport. Pellegrino was a member but Grasso and Tropiano were not. Pellegrino and Grasso caused a special meeting of this group to be called for April 7th by speaking to the president, William Lockwood. Caron with his father and two other members, Joseph Pauley and Charles Williams, attended this meeting in Fairfield, Connecticut, which was held at the garage of the Reliable Sanitation Company, a BIRCA member. On the way Caron stopped and picked up a one-way pocket radio transmitter from Connecticut State Police Trooper David Paige and Lieutenant Pat Carroll of the Fairfield Police Department for protective contact with the police. At the meeting Pellegrino introduced Grasso and Tropiano and turned the meeting over to Grasso, who told the members that Caron should keep away from his customers and that if the members did not cooperate to keep Caron out of Milford, he would purchase trucks and send them into Bridgeport with "enough muscle" to give the local people "a rough time." When Caron asserted his right to do business where he chose, Grasso said, to use Caron's words, "that where he comes from in New York, guys like me they knew how to take [care] of me; I would end up with either my arms broke or in the river," and that "you can stretch a rubber band just so far and it's going to break and somebody is going to get hurt." Tropiano stated that he had the money to buy the trucks and to furnish the muscle if Caron was not persuaded to stop servicing Milford customers. After the open meeting, Tropiano had a conference in the back room, during which he told Lockwood that it was the lat-

ter's duty to obtain the stop from Caron for Tropiano or buy the stop back and give it to C & A or pay C & A directly for the stop. When Caron denied undercutting Grasso's price for the Milford Rivet account, Grasso called Caron a liar. Caron, nevertheless, continued to service this account.

Post BIRCA Meeting

On April 9th, in order to convince Grasso and Tropiano that Caron was not undercutting their service price, Mrs. Caron interviewed Robert Reiss, the manager of Milford Rivet Company, and obtained from him a false purchase order of $125.00 a month, which was given to Pellegrino on April 10th. According to Reiss, she appeared so nervous and disturbed at the time that he made an appointment to see the Mayor of Milford. A week later Caron received a call from Pellegrino, who said Caron was "a fool • • • that I have a very nice family and that it would be a shame if something happened to my children on their way to school, or my wife." Caron did nothing about the two accounts but he took his children off the school bus and had his wife drive them to and from school four times a day. At the same time his home was placed under police surveillance, and Mrs. Caron was in such an emotional state that her doctor prescribed tranquilizers.

Not until the following July 4th did Caron hear from any of the appellants. On that day Grasso arrived uninvited at Caron's home during a family picnic. Caron told Grasso that he would not relinquish the two accounts but he agreed not to solicit any more business in Milford and, specifically, not to solicit any of Grasso's customers. Caron planned to build a business in Milford and his agreement

to surrender this plan was due to fear for himself and family. Caron did not solicit any of Grasso's customers or any further business in Milford thereafter.

Contradictory Testimony

The appellants did not take the stand but they did cross-examine the Carons severely. Upon cross-examination Caron admitted certain errors in his direct testimony including the date when he began servicing new accounts in Milford and the number of phone calls he received from Pellegrino and Grasso, and errors, inaccuracies and inconsistencies between his testimony in court and the statements he made to Assistant United States Attorney Heyman and to the Grand Jury. Mrs. Caron also manifested some confusion and inconsistencies upon cross-examination. Furthermore, appellants called six witnesses who were present at the BIRCA meeting and who contradicted Caron by denying that any threats were made by Grasso or Tropiano at the meeting. There was, however, testimony by the Government witness Lockwood (later declared a hostile witness after attempting to escape from his grand jury testimony) corroborating Caron with respect to Lockwood's meeting with Tropiano in the rear room of the BIRCA meeting place. There was also testimony by Leon Gillick, who was present at the meeting, who testified that he remembered Grasso's statement about bringing trucks from the New Haven area with a few muscle boys, and also Grasso's statement about stretching a rubber band, and by Joseph Pauley, another member present, who remembered a statement being made by someone about stretching a rubber band and also that the whole atmosphere of the meeting was "trouble."

Sufficiency of the Evidence

A witness may be inaccurate, contradictory and even untruthful in some respects and yet be entirely credible in the essentials of his testimony. The Carons' errors, inconsistencies and contradictions were elaborately catalogued in the appellants' summation, and the trial court instructed the jury as to the guidelines to be utilized in determining credibility, including its duty to appraise a witness' reaction when faced with contradictions. Nevertheless, the jury believed the Carons upon those issues crucial to the Government's case. It is the province of the jury and not of the court to resolve discrepancies in a witness' testimony which in any way reflect upon his credibility (*United States ex rel. Anderson* v. *Fay,* 394 F.2d 109 (2d Cir. 1968)) and to choose between competing inferences of fact. *United States* v. *Marchisio,* 344 F.2d 653 (2d Cir. 1965). The Carons' testimony did not stand alone. It was undisputed that there was a meeting of Tropiano, Grasso, Pellegrino, and Caron on March 2, 1968, at Howard Johnson's restaurant, arranged by Pellegrino. Additionally, the Carons' testimony was corroborated by other witnesses on further details establishing the scenario for their story in the following respects: Caron took two "stops" away from C & A; he and his wife went to the Connecticut State Police; he removed his container from Jo-Nick's for two weeks and then returned it; Milford Rivet Company discontinued service with C & A and awarded the business to Caron; Lockwood called a special meeting of BIRCA at the request of Pellegrino and Grasso, although neither Grasso nor Tropiano were members; this meeting was held to consider the problem arising from Caron taking C & A "stops," at which Tropiano, Grasso and Pellegrino were present and at which statements were made about bring-

ing in trucks and "stretching a rubber band"; Bertase called Caron at Grasso's request; Mrs. Caron spoke to Reiss, the manager of Milford Rivet Company, and obtained a false purchase order from him; Caron and Mrs. Caron looked worried and disturbed, and Caron's house was placed under police surveillance.

The jury was free to disbelieve the contradiction by the six BIRCA witnesses, especially in view of the involvement of each in the controversy and Lockwood's effort to retreat from his grand jury testimony. The jury was not required to rely upon words alone but could consider as part of the evidence, the demeanor, bearing, interest and conduct of the witnesses. As aptly phrased by Judge L. Hand: "* * * the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952). Once, however, the verdict of guilty has been returned, the evidence must be viewed "most favorably to [the Government], which includes * * * the indulgence in all permissible inferences in its favor." *United States* v. *Arterbridge*, 374 F.2d 506 (2d Cir. 1967); *United States* v. *Brown*, 236 F.2d 403, 405 (2d Cir. 1956); *United States* v. *Castellana*, 349 F.2d 264, 267 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966), *reh. denied*, 384 U.S. 923 (1966); *United States* v. *Marchisio*, *supra*. We find no basis to hold that the Carons' testimony was incredible as a matter of law, or that the evidence was insufficient to support the verdict.

The Hobbs Act

The application of the Hobbs Act to the present facts of this case has been seriously challenged by the appellants

upon the ground that the Government's evidence indicates that no "property" was extorted and that there was no interference or attempted interference with interstate commerce. They assert that nothing more than "the right to do business" in the Milford area was surrendered by Caron and that such a right was not "property" "obtained" by the appellants, as those terms are used in the Act. While they concede that rubbish removal accounts which are purchased and sold are probably property, they argue that the right to solicit business is amorphous and cannot be squared with the Congressional expression in the Act of "obtaining property." The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress had to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States,* 361 U.S. 212, 215 (1960). The concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things (*United States* v. *Provenzano,* 334 F.2d 678 (3d Cir. 1964), *cert. denied,* 379 U.S. 947 (1964); *United States* v. *Nedley,* 255 F.2d 350 (3d Cir. 1958)), but includes, in a broad sense, any valuable right considered as a source or element of wealth (*Bianchi* v. *United States,* 219 F.2d 182 (8th Cir. 1955), *cert. denied,* 349 U.S. 915 (1955), *reh. denied,* 349 U.S. 969 (1955)) and does not depend upon a direct benefit being conferred on the person who obtains the property (*United States* v. *Green,* 350 U.S. 415 (1956)).

Obviously, Caron had a right to solicit business from anyone in any area without any territorial restrictions by the appellants and only by the exercise of such a right could Caron obtain customers whose accounts were admittedly valuable. Some indication of the value of the right to solicit

customers appears from the fact that when the C & A accounts were sold for $53,135, C & A's agreement not to solicit those customers was valued at an additional $15,000. The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution (*Louis K. Ligget Co.* v. *Baldridge*, 278 U.S. 105 (1928); cf., *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465 (1921); *Small* v. *United States*, 333 F.2d 702 (3d Cir. 1964); *Pierce Ford Sales, Inc.* v. *Ford Motor Co.*, 299 F.2d 425 (2d Cir. 1962), *cert. denied*, 371 U.S. 829 (1962)). Caron's right to solicit accounts in Milford, Connecticut constituted property within the Hobbs Act definition.

The second challenge to the application of the Hobbs Act is equally without merit. The phraseology of the Act makes it clear that the interference or attempted interference with interstate commerce "in any way or degree" is prohibited. Stated differently, extortion or threats of violence need affect interstate commerce only in a minimal degree to constitute a violation. The broad and extensive reach of the commerce clause under the Hobbs Act has been upheld in a variety of circumstances. *United States* v. *Amabile*, 395 F.2d 47 (7th Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969); *Battaglia* v. *United States*, 383 F.2d 303 (9th Cir. 1967), *cert. denied*, 390 U.S. 907 (1968); *Hulahan* v. *United States*, 214 F.2d 441, 445 (8th Cir. 1954); *United States* v. *Malinsky*, 19 F.R.D. 426, 428 (S.D.N.Y. 1956). Here Caron employed more efficient, modern and costly Dempster front-end loading refuse removal trucks, operated by means of two mechanical arms which lift the rubbish containers up and over the front

of the truck and dump them into the rear, providing advantages of cleanliness and security. The trucks required specialized containers for each customer. Both the trucks and containers were manufactured by Dempster Corporation in Knoxville, Tennessee, and were purchased by Caron through Lovard Corporation, Dempster's representative in Syracuse, New York, the trucks being shipped at times f.o.b. shipping point directly from Knoxville. After a large shipment, the receptacles were often stored by Lovard in New Haven, from which Caron would pick up containers as needed. Caron served Jo-Nick's with one container and Milford Rivet Company with another container, which after a time was removed for Milford Rivet's own receptacles. The appellants insist that such evidence is insufficient to support any likely obstruction or effect upon interstate commerce. We cannot agree. Interstate commerce was involved and attempted interference, if not actual interference, was clearly established. Caron's surrender of his right to solicit additional customers in Milford automatically limited his future orders for receptacles for new customers and the trucks required to serve such customers.[2] Sufficient evidence, both circumstantial and otherwise, was present to warrant a finding that the conduct of the appellants constituted extortion or attempted extortion which affected interstate commerce within the proscription of the Hobbs Act. *United States* v. *Provenzano, supra; United States* v, *Stirone,* 262 F.2d 571 (3d Cir. 1958), *reversed on other grounds,* 361 U.S. 212 (1960).

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2 Although not mentioned in the Court's charge, the appellants' attempted interference with Caron's relationship with Milford Rivet could be construed as an attempted restraint upon the latter's operational efficiency and consequently an attempted restraint upon interstate commerce, even though in a minimum degree.

Pretrial Rulings

The trial judge is charged by the appellants with numerous errors in his pretrial rulings including his failure to disqualify himself, error in his denial of the challenge to both the grand and petit jury venires, his failure to grant a change of venue, and his failure to permit an individual *voir dire*.

The affidavit for disqualification, submitted under 28 U.S.C.A. §144, alleges "personal bias or prejudice" based upon the factual allegations that the trial judge fixed bonds of $100,000 for Tropiano and $25,000 for Grasso; that he presided at the bail hearing, disclosing the defendants' criminal records, and that prior to the hearing the Chief Assistant United States Attorney was in the judge's chambers. A judge is required to assume the truth of the facts stated in an affidavit for disqualification and to excuse himself when required by those facts. But he is also obligated not to rescue himself when there is an insufficient basis for so doing (*Rosen* v. *Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966)), the test being whether the facts alleged give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States*, 255 U.S. 22, 33-34 (1921); *United States* v. *Hanrahan*, 248 F. Supp. 471 (D.D.C. 1965). The mere fact that the trial judge rendered adverse rulings to a party at a bail hearing or has become familiar with a defendant's prior record does not automatically or inferentially raise an issue of bias or disqualify him from presiding at a trial at which the jury is to determine that person's guilt or innocence. *Lyons* v. *United States*, 325 F.2d 370 (9th Cir. 1963), *cert. denied*, 377 U.S. 969 (1964); *Barry* v. *Sigler*, 373 F.2d 835 (8th Cir. 1967); *United States* v. *Kravitz*, 303 F.2d 700 (3d Cir. 1962), *cert. denied*, 371 U.S. 922

(1962). The mere presence of an Assistant United States Attorney in the judge's chambers, which incidentally in this case was devoted solely to administrative matters, is in the same category.[3] The affidavit was manifestly insufficient.

The Jury Array

Appellants contend that the array of grand and petit jurors who indicted and convicted them in both instances, was selected in violation of the Federal juror standards set forth in 28 U.S.C.A. §1861[4] as they existed prior to the effective date of the 1968 amendment, and also of their constitutional right to due process. The challenge is directed to the selection of the jurors by the so-called "key man suggestor system," stemming from the Connecticut State juror requirements as set forth in §51-217, Conn. Gen. Stats., and more fully described in *United States* v. *Romano*, 191 F. Supp. 772 (D. Conn. 1961). Pursuant to this system a letter was sent to a number of citizens from a variety of backgrounds, requesting them to suggest to the jury commissioners the names of residents of their communities who they believed would "make qualified jurors for the Federal court" and stating that a prospec-

3 In his brief Grasso states: "we make no claim that, as a result of what occurred at trial, bias or prejudice was demonstrated."

4 At that time Section 1861 read as follows:

"Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

tive juror, "in addition" to the statutory qualifications, "should be esteemed in his community as a person of good character, approved integrity, and sound judgment."[5] The assault is made on both statutory and constitutional grounds and is based upon a claim that this method of selection violates the Federal juror standards contained in the Civil Rights Act of 1957, amending Section 1861, 28 U.S.C.A. The only disqualifications set forth in this section are limited to age, residence, mental or physical infirmities, felony convictions, and literacy.

While portions of the jury list in this case were selected by the key man suggestor system, other portions were selected at random from voter lists, telephone and city directories.[6] Appellants rely heavily upon *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966), which struck down a jury list compiled by jury commissioners who treated the Federal statutory standards as minimum qualifications, to which they added their own ideas as to good character, intelligence and ability to understand, which in turn resulted in an unrepresentative cross-section of the community and the exclusion from the jury panel of a particular class. That case must be limited to its own facts and is no authority against the key man suggestor

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5 The phrase "in addition" was inappropriate but the letter explained this by adding: "In determining 'esteem,' please keep in mind that this does not require wide public recognition or high place. Integrity, intelligence, sound judgment, a sense of responsibility—in short, all those qualities of a first-class citizen which cause a man to be esteemed by his fellows—are to be found among the *unheralded just as often as among the prominent* * * * In making up this list, we ask that you make a conscious effort to include both men and women from a variety of backgrounds and occupations so as to give us, *as nearly as possible, a representative cross-section of your community.*" (Emphasis supplied.)

6 For example, a venire of petit jurors was selected from 1,252 persons, 510 of whom were selected in accordance with the key man suggestor system and 742 were chosen at random from voter lists, telephone and city directories.

system, for the same Court, in a case[7] heard *en banc* with *Rabinowitz* approved the use of a properly chosen key man suggestor system, and in cases before[8] and after[9] *Rabinowitz* the same court upheld the use of such a system. Congress did not in the 1957 amendment establish a uniform system of providing for the selection of a list of qualified jurors from which grand or petit jurors were to be drawn. *Beatrice Foods Co.* v. *United States*, 312 F.2d 29, 35 (8th Cir. 1963), *cert. denied*, 373 U.S. 904 (1963). The selection process and the choice of specific sources from which names might be drawn were entrusted to the court clerk and jury commissioner. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946); Report of the Judicial Conference Committee on the Operation of the Jury System, 26 F.R.D. 409, 421 (1960).

The 1957 amendment has not been read as prohibiting the adoption of practical and reasonable methods of jury selection which are in no way inconsistent with the Federal standards. *Hoyt* v. *State of Florida*, 368 U.S. 57 (1961); *United States* v. *Henderson*, 298 F.2d 522 (7th Cir. 1962), *cert. denied*, 369 U.S. 878 (1962). There has been no suggestion that the Connecticut selection procedure was not a random selection or that the selection produced by the system did not represent a fair cross-section of the com-

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7 *Brooks* v. *Beto*, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967), *reh. denied*, 386 U.S. 1043 (1967).

8 In *Chance* v. *United States*, 322 F.2d 201 (5th Cir. 1963), *reh. denied*, 331 F.2d 473 (1964), *cert. denied*, 379 U.S. 823 (1964), the same Circuit approved the use of a properly chosen key man suggestor system in two Florida counties where Negro jurors were chosen from citizens recommended by Negro ministers and business leaders.

9 *Hunt* v. *United States*, 400 F.2d 306 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969), where the same Circuit upheld a jury suggestor letter in which the clerk added the additional qualification that the prospective jurors be "esteemed" in their respective communities.

munity or that it operated to exclude any special class or group. As in the past, we hold that the test under the 1957 amendment is not whether a particular method of selection, such as voter registration lists, was employed but whether the use of such a procedure resulted in an array which was a representative cross-section of the community or an array from which a cognizable group or class of qualified citizens has been systematically excluded. *United States* v. *Caci*, 401 F.2d 664 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969), *cert. granted as to other defendants and vacated on other grounds sub nom., Giordano* v. *United States*, 394 U.S. 310 (1969); *United States* v. *Kelly*, 349 F.2d 720, 778 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *United States* v. *Greenberg*, 200 F. Supp. 382 (S.D.N.Y. 1961). The burden was on the appellants to show that the procedure utilized by the partial use of the key man suggestor system did not meet the accepted criteria for Federal jury selection or was inconsistent with the Federal minimums (*United States* v. *Henderson, supra; United States* v. *Ware*, 237 F. Supp. 849 (D.D.C. 1964), *affirmed*, 356 F.2d 787, 790 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 919 (1966)) which burden they have failed to carry. Accordingly, the challenge to the jury array was properly denied.

Pretrial Publicity

In early February, 1968, a motion was made by Dolores Proto to quash a grand jury subpoena. On February 11th, the following weekend, an inflammatory article appeared in the Connecticut Sunday Herald concerning organized crime and relating to Tropiano's criminal background, associating Grasso with him as his number one cohort. After the indictment was returned on March 27, 1968, the Sunday Herald repeated the inflammatory material and linked Tropiano

and Grasso with the Mafia or Cosa Nostra. In a radio interview on March 27, 1968, with the Assistant United States Attorney, questions were raised referring to Tropiano and his rank with the Mafia, with respect to which the Assistant United States Attorney refused to comment. Between that time and the trial on October 23rd, no further inflammatory personal information concerning the activities of the accused appeared in the press.

In May of that year a motion was made by Tropiano and Grasso for a change of venue, which was denied without prejudice and was renewed at the time of the trial in October along with a motion for an individual *voir dire* of the jurors. Both motions were denied and the court then proceeded to question the veniremen *en bloc*. There is no question that the trial court is obligated to provide the defendants with a constitutionally fair trial by affording them protection against the probability of prejudice arising from exposure to inflammatory and prejudicial publicity. *Estes* v. *Texas*, 381 U.S. 532, 542-543 (1965), *reh. denied*, 382 U.S. 875 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333, 352-353 (1966). However, no hard and fast rule of general application can be formulated since the determination of the extent, if any, of the impact of prior adverse publicity depends upon the circumstances of each individual case. But it is well recognized that the passage of time frequently and effectively erodes the impress of the damaging statements upon the minds of the jurors. *Beck* v. *Washington*, 369 U.S. 541, 555-558 (1962), *reh. denied*, 370 U.S. 965 (1962); *Stroble* v. *State of California*, 343 U.S. 181 (1952).

Approximately eight months elapsed between the publication of the pejorative characterizations and the trial in this case. The trial judge asked the prospective jurors on three occasions whether they had heard or read anything about

the case and only two remembered anything about newspaper accounts of the events and these accounts related to an innocuous item, printed the Friday before the trial, relating only to the assignment of the case for trial. The appellants contend that this inquiry was too general and that a personalized *voir dire* was necessary to effect a proper inquiry into the impact on the minds of the jury of the inflammatory publicity, citing a number of cases and, in particular, *Patriarca* v. *United States,* 402 F.2d 314 (1st Cir. 1968), *cert. denied,* 393 U.S. 1022 (1969). We find no factual parallels in the cases cited and none of the hazards to a fair trial described by the ABA, *Standards Relating to Fair Trial and Free Press* (Approved Draft, March, 1968), pp. 25-40. There was no showing that at the date of the trial in October the adverse publicity was fresh in the minds of the community or the jurors or that any remnant of probable prejudice remained from the prior exposure which would require a change of venue. *Beck* v. *Washington, supra; United States* v. *Armone,* 363 F.2d 385, 393-396 (2d Cir. 1966), *cert. denied,* 385 U.S. 957 (1966); *United States* v. *Battaglia,* 394 F.2d 304, 317-318 (7th Cir. 1968). The problem of a personalized *voir dire* rests in the wide discretion of the trial judge (*United States* v. *Bowe,* 360 F.2d 1, 12 (2d Cir. 1966), *cert. denied,* 385 U.S. 961 (1966); *United States* v. *Gillette,* 383 F.2d 843, 849 (9th Cir. 1967)) and we believe the trial court in this instance did all that was required and did not abuse its discretion in denying a personalized *voir dire.*

Evidentiary Rulings

The appellants urge that they were prejudiced by several evidentiary rulings by the trial court, only two of which deserve consideration: one involving the admission of a

false denial by Pellegrino, and the other the admission of evidence of bad reputations of Tropiano and Grasso.

On January 16, 1968, one of the Government's Special Agents, in the process of investigation, interviewed Pellegrino concerning his knowledge of certain facts relevant to the case. Pellegrino denied to the Agent that he was a member of BIRCA (in fact he was a former president); that he knew Tropiano, Grasso or Caron or anything about the refuse business, or of any problem between Caron and Tropiano and Grasso, or that he ever attended any meeting of BIRCA and in particular the April 7, 1967 meeting—all subsequently established as falsehoods. Tropiano and Grasso argue that *Bruton* v. *United States*, 391 U.S. 123 (1968), precluded the admission of Pellegrino's false exculpatory statements. The trial judge, in the absence of the jury, ruled that *Bruton* was inapplicable and thereafter, in the presence of the jury, permitted the Government to introduce those denials through one of its Special Agents as evidence of Pellegrino's guilty conscience. Prior to the admission of this testimony and again in its charge to the jury, the court was careful to instruct the jury that this testimony must be limited only to the charge against Pellegrino. Tropiano and Grasso argue that no instructions could be sufficient to limit the testimony in the minds of the jury to Pellegrino alone and that the admission denied them the right of confrontation within the scope of *Bruton*. We disagree.

Pellegrino's statement was completely exculpatory as to him and in no way inculpatory as to his co-defendants. As far as Pellegrino was concerned, the denials were offered not as hearsay for the truth of their contents but as a verbal act by Pellegrino contradicted by evidence subsequently placed before the jury from which a guilty

conscience might be inferred. When proven to be false, such an exculpatory statement "is circumstantial evidence of 'guilty consciousness' and has 'independent probative force.'" *United States* v. *Smolin,* 182 F.2d 782, 786 (2d Cir. 1950); *United States* v. *Farina,* 218 F.2d 62, 63 (2d Cir. 1954). Not every statement of a co-defendant is barred by *Bruton.* See *United States* v. *Lipowitz,* 407 F.2d 597 (3d Cir. 1969). Pellegrino's denials contained no accusation against his co-defendants and were not offered for that purpose (McCormick, *Evidence,* §225, pp. 460-461 (2d ed. 1954); *cf.,* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv. L. Rev. 177, 190-191 (1948)). Accordingly, a confrontation with Pellegrino was not required by the Sixth Amendment and the appellants have no basis to complain of an unconstitutional admission of evidence.

Referring to the bad reputation evidence, it is a truism that no defendant can be convicted upon his bad reputation or bad character alone. *Michelson* v. *United States,* 335 U.S. 469, 475 (1948). While bad reputation can never be the sole issue upon which a conviction rests, it may become relevant where one of the elements of the offense is the instillation of fear in the victim since such a reputation frequently conveys a tacit threat of violence. In order to establish a Hobbs Act extortion, the Government was compelled to show that the property was extorted by threatened violence or fear. Thus fear was one of the elements of the offense and bad reputation brought home to Caron by the appellants was relevant together with the other evidence to show that Caron acted out of fear. In fact, he testified that his fear was partially due to the very bad reputations of Tropiano and Grasso, and others testified that he looked worried and frightened. The appellants did not choose to

cross-examine Caron upon this issue, although the court in no way limited the scope of the potential cross-examination. Three times the Court cautioned the jury on the limited use of the bad reputation testimony, clearly explaining that the appellants were not to be tried on their bad reputations alone.[10] Likewise, the Court warned that Bertase's and Lockwood's testimony as to bad reputation given under Count 2 (which was subsequently dismissed) was to be considered only under Count 4—the conspiracy charge. Under the carefully limited instructions of the trial court, we find no error in the admission of the bad reputation evidence. *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964), *reh. denied*, 377 U.S. 1010 (1964); *cf.*, *United States* v. *Kennedy*, 291 F.2d 457 (2d Cir. 1961).

Telephonic and Electronic Surveillance

The Connecticut State Police, as part of their investigation, on two occasions installed a tape recorder upon the Caron telephone. After the conference with Grasso on March 6, 1967, Caron and his wife visited State Police Lieutenant Donald Paige, who initiated an investigation of the alleged threats. As previously mentioned, the Carons testified that in March, 1967 they received many phone calls from Grasso and Pellegrino, in one of which Pellegrino told Mrs. Caron that her husband was playing with a "rough bunch of guys" and that she should have him "lay off before he got hurt." A tape recorder was installed in the Caron home on March 22, 1967 and remained there for two days, during which time Caron received one call from Grasso,

10 In fact, in his brief Tropiano concedes that "the Court did go to unusual lengths to shield the defendants against unfairness in this sector of the proofs."

which was recorded, and another one from Robert Reiss, manager of the Milford Rivet Company. Both of these recordings were introduced into evidence by the appellants. This recorder was removed on March 24th but, at the request of Mrs. Caron, it was reinstalled in her home on April 3rd and remained there until April 16th. During this period there were recorded on the tape, conversations between Caron and several members of BIRCA, referring to the various problems arising from Caron's business. The only portion of this recording which was made part of the record, was the portion of the conversation between Peter Bertase and Leonard Caron, a copy of which was given to the appellants' counsel before cross-examination. There was another tape recording of a conversation between Caron and Pellegrino which took place in Caron's house, which was unintelligible. With the exception of the Bertase conversation with Caron, the Government did not use any of the tapes at the trial and complied with its duty of full disclosure to counsel for appellants.

Appellants argue that the telephonic tape recordings invaded their Fourth Amendment rights, citing *Osborn* v. *United States,* 385 U.S. 323 (1966), *reh. denied,* 386 U.S. 938 (1967), and *United States* v. *White,* 405 F.2d 838 (7th Cir. 1969), *cert. granted,* 394 U.S. 957 (1969). *Osborn* has no application to this case and this Court in *United States* v. *Kaufer,* 406 F.2d 550 (2d Cir. 1969), *affirmed,* 394 U.S. 458 (1969), *reh. denied,* 395 U.S. 917 (1969), has refused to follow *White,* holding that the admission into evidence of consensual tape recording is constitutionally permissible. See *Rathbun* v. *United States,* 355 U.S. 107 (1957), *reh. denied,* 355 U.S. 925 (1958).

On another occasion, on April 7th, Caron took with him to the BIRCA meeting a portable one-way radio trans-

mitter equipped with an antenna in his sleeve, which was given to him by State Trooper David Paige for his protection. In spite of the fact that it was tested and found working early in the day at a range of 150 feet, Trooper Paige could not hear anything significant although he was only twenty feet away. The police testified that they heard nothing but static, which they suggested was due to the cinder block construction of the building, the malfunction of the transmitter, or the inclement weather. It is the appellants' position that the electronic surveillance of this meeting was likewise a violation of their Fourth Amendment rights. While the Fourth Amendment protects people rather than places (*Katz* v. *United States,* 389 U.S. 347 (1967)), it does not prohibit the transmission of a conversation of a defendant who knowingly exposes his statements to the public. Thus in this case the BIRCA meeting was open to all the members and Tropiano and Grasso had no justifiable expectation of privacy at this meeting which they could claim was constitutionally invaded in violation of the Fourth Amendment. *Hoffa* v. *United States,* 385 U.S. 293 (1966), *reh. denied,* 386 U.S. 951 (1967); *Lopez* v. *United States,* 373 U.S. 427 (1963), *reh. denied,* 375 U.S. 870 (1963).

The other objections to the surveillance were of a minor nature, which we find to be completely irrelevant.

Other Claims of Error

Among the many other claims of error, only a few merit consideration. Appellants assail the constitutionality of the Hobbs Act, the indictment, and the Court's charge. They assert that the Hobbs Act requires proof of completed extortion and if construed to cover attempted extortion, is constitutionally void for vagueness. The premise for this

claim is that the phrase "attempts or conspires so to do," as used in the Act, refers to interference with commerce and not to the word "extortion." One answer to this contention is that Caron's agreement not to solicit business in the Milford area was, in fact, evidence of completed extortion under the substantive Count 1. As to the conspiracy Count 4, the textual analysis of the statute would clearly embrace an attempt or conspiracy to interfere with commerce by extortion even though the attempt or conspiracy failed because the extortion was uncompleted. *United States* v. *Pranno,* 385 F.2d 387, 389-390 (7th Cir. 1967), *cert. denied,* 390 U.S. 944 (1968). Tropiano and Grasso also urge for the first time on appeal that Count 4 of the indictment was invalid because it charges a conspiracy to attempt to extort. The wording of Count 4 accuses the appellants of a conspiracy to violate the Act "by extortion and attempted extortion." The phrase "attempted extortion" is obviously surplusage, which the appellants failed to show in any way misled them. *Cf., United States* v. *Di Pietroantonio,* 289 F.2d 122, 124 (2d Cir. 1961). Since the sentences on Counts 1 and 4 were concurrent, appellants can hardly claim prejudicial error. *Lawn* v. *United States,* 355 U.S. 339, 362 (1958), *reh. denied,* 355 U.S. 967 (1958); *United States* v. *Kennedy, supra.*

The Court charged the jury that fear in Hobbs Act cases includes fear not only of violence but also of economic loss. Appellants assert that the inclusion of "economic loss" in the charge was erroneous because it indicates that the mere threat of undercutting prices by competition constitutes Hobbs Act extortion, which of course it does not. The charge, they claim, should have explained, among other things, that such threats were excluded from the ambit of the Act. It is too late in the day to contend that fear of

economic loss is excluded from the Hobbs Act (*Bianchi* v. *United States, supra; Nick* v. *United States,* 122 F.2d 660 (8th Cir. 1941), *cert. denied,* 314 U.S. 687 (1941), *reh. denied,* 314 U.S. 715 (1941)) and whatever theoretical merit there may be in appellants' contention as to competition, such an explanation was unnecessary upon the record of this case.

Finally, Pellegrino objects to the trial court's aider and abettor instructions, asserting that since he was not named in the indictment as an aider and abettor the charge was unnecessary and erroneous in that it was unclear as to its application to the substantive count or to the conspiracy count, and failed to explain that a conviction as an aider and abettor was impossible without prior proof of the commission of the crime by a principal. A defendant may be indicted for the commission of a substantive crime and convicted of aiding and abetting its commission although not named in the indictment as an aider and abettor (*United States* v. *Provenzano, supra; United States* v. *Washington,* 287 F.2d 819 (7th Cir. 1961), *cert. denied,* 366 U.S. 969 (1961); *Nassif* v. *United States,* 370 F.2d 147 (8th Cir. 1966); *Glass* v. *United States,* 328 F.2d 754 (7th Cir. 1964), *cert. denied,* 377 U.S. 983 (1964)), and it is unnecessary that the principal be first convicted or even identified. *Gray* v. *United States,* 260 F.2d 483 (D.C. Cir. 1958). Conspiracy to commit a substantive offense and aiding and abetting the commission of the same offense constitute separate and distinct crimes and a defendant may be convicted of both. *Nye & Nissen* v. *United States,* 336 U.S. 613 (1949); *United States* v. *Kensil,* 195 F. Supp. 115 (E.D. Pa. 1961), *affirmed,* 295 F.2d 489 (3d Cir. 1961), *cert. denied,* 368 U.S. 967 (1962). In its charge the trial court read to the jury the aiding and abetting statute and explained it in

clear and unambiguous language. We find no factual similarity to *United States* v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962), cited by Pellegrino, nor any error in the Court's charge upon this point or in any other respect. The other claims being similarly without merit, are hereby rejected.

Affirmed.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of November one thousand nine hundred and sixty-nine.

Present:

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
Circuit Judges,
HON. JOHN R. BARTELS,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RALPH "WHITEY" TROPIANO, WILLIAM P. GRASSO, and LAWRENCE R. PELLEGRINO,
Defendants-Appellants.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they are hereby affirmed.

R. DANIEL FUSARO
Clerk

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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. **1101**

WILLIAM GRASSO
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No.

WILLIAM GRASSO
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States

The petitioner William Grasso respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on November 26, 1969.

The opinion of the Court of Appeals (Waterman and Hays, Circuit Judges, Bartels, District Judge) is thus far unreported, and is reprinted in its entirety in an appendix hereto. Petition for rehearing was denied without opinion. There was no written opinion filed in connection with the district court proceedings.

STATEMENT OF JURISDICTION

The judgment and opinion of the Court of Appeals, *sub nom. United States v. Ralph "Whitey" Tropiano*, et al, from which review is sought, was entered on November 26, 1969. A timely petition for rehearing was filed and was denied on December 23, 1969.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. May false out of court exculpatory statements made by one defendant, offered against him as an admission by conduct, showing so-called "consciousness of guilt", be admitted in a multi-defendant conspiracy trial, under *Bruton v. United States*, 391 U.S. 123 (1968) when the particular false statements amount to an accusation that the co-defendants were guilty of wrongdoing?

2. In view of the inflammatory and prejudicial nature of the pre-trial publicity, did the trial court err, while exploring defendants' Motions for Change of Venue and/or alternative relief, in refusing to question the prospective jurors individually?

3. Is the amorphous and intangible "right to do business" in a specific locale "property" within the meaning of the Hobbs Act?

4. May the mere threat of legal economic competition qualify as "force, violence or fear" so as to be criminally proscribed by the Hobbs Act?

5. Does the Hobbs Act actually make a "federal case" out of every robbery or extortion, no matter how *de minimus* the effect on interstate commerce?

6. Was not a substantial enough showing of possible prejudice, on the part of the trial court, established by affidavits and exhibits to require that the court disqualify itself.

7. Was the admission into evidence of a taped telephone conversation, recorded with the consent of the complaining witness, improper under the rationale of *United States vs. White*, 405 F. 2d 838 (7 Cir. 1969), cert. granted 394 U.S. 957 (1969)

STATUTE INVOLVED

18 U.S.C. §1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining, of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful

use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

I. The Proceedings

The alleged basis for federal jurisdiction in this criminal case, on all counts, was 18 U.S.C. Sec. 1951, The Hobbs Act. A four count indictment, with three substantive counts and one conspiracy count, was returned in New Haven on March 27, 1968. The three named defendants were petitioner Grasso, Ralph "Whitey" Tropiano and Lawrence Pellegrino. Only Pellegrino was named in Count Three which was severed prior to trial; all defendants were named in the other counts which went to trial.

Not guilty pleas were entered by all defendants on April 3, 1968. Timely Motions for Disqualification of Chief Judge Timbers were filed, with supporting affidavits and exhibits, on April 26th. Also filed was a Motion for Change of Venue, Continuance and/or Assignment for Trial in Hartford occasioned by prejudicial pretrial publicity. The court refused to disqualify itself, and denied the Change of Venue motion without prejudice to renewal at time of trial.

The case was reached for trial on October 23, 1968. When reached, defendants Tropiano and Grasso renewed their earlier motions for Change of Venue, Further Continuance and/or Trial in Hartford. In conjunction with that motion, said defendants moved the court to allow exploration of the publicity question by individual voir dire of the veniremen, by counsel or the court. (160a*) The Court refused to allow individual questioning of jurors and, after group interrogation by the court, the motion for Change of Venue, Continuance or Trial in Hartford was also denied.

The trial proceeded from October 23d until November 15th. A number of disputed matters arose, which will be more fully described *infra*, concerning the court's rulings on evidence and its instructions to the jury. Motions for Judgment of Acquittal were made at the end of the prosecution case, and again after all the evidence. The court ordered each defendant acquitted as to Count Two; (10a) it denied the motions otherwise, and submitted Counts One and Four to the jury on November 15, 1968. After approximately nine hours of deliberation, the jury returned its verdicts of guilty for all three accused on Count One, also convicting Grasso and Tropiano on the Count Four conspiracy charge. (11a)

Upon motion of the government, the court revoked all bonds pending appeal, and all defendants have been incarcerated for the past 14 months. On December 9, 1968, the court imposed on Grasso a sentence of 10 years imprisonment on each of Counts 1 and 4, to be served concurrently, and a $7,500.00 fine on Count 1. Timely notices of appeal were filed resulting in the proceedings in the Court of Appeals described above in the Statement of Jurisdiction.

* Joint Appendix in Court of Appeals, a copy of which has been certified to this Court along with the record below.

II. The Facts

The government's case against all three defendants rested almost entirely on the testimony—and credibility—of Leonard Caron.* Active in the family rubbish business, Caron Refuse Removal, Inc., for sixteen years, Caron testified that his first contact with defendants Grasso and Tropiano came on March 2, 1967, through Pellegrino, a competitor in the rubbish business he had known for about ten years. (176a)

Caron, recently having moved to Milford, Connecticut, had begun servicing Jo-Nicks' Market late in February, 1967. (177a) Prior to Caron's taking the account, it had been serviced by C. & A Refuse Removal—a partnership in which Tropiano and Grosso were two of the three principals. Caron stated that he received a call from Pellegrino on March 2d, at which time the latter stated that Grasso and Tropiano wished to speak with him. (178a) Caron invited them over, but Pellegrino declined, arranging for a meeting at Howard Johnson's that evening. (178a, 179a) Pellegrino picked Caron up and drove him to the restaurant where he introduced the other defendants as the owners of C & A, and also as his partners and backers. (180a)

Caron claimed that Grasso said Jo-Nicks was his account, which he had purchased, and that Caron should leave it alone. (181a) If Caron didn't "cooperate", Grasso said he would push him out of Milford—"way out". According to Caron, Tropiano added, "We know how to take care of guys like you". (182a) Caron refused to accede, and left with Pellegrino. On the way home, Pellegrino purportedly

* Caron's wife Ruth also testified and corroborated the thrust of her husband's story, and supported his testimony, factually, on a few points. A number of other witnesses, *infra*, offered evidence to corroberate Caron's "fear".

told him that he didn't know what he was doing, that "these two men were not to be fooled with" and that he was liable to get his "head broken or something similar". (184a)

Some time shortly after the meeting, Caron removed the refuse container he had left at Jo-Nicks. Although Caron was rather hopelessly inconsistent about when and how long his can was "out" of Jo-Nicks, it appears that it was removed for approximately two weeks through the middle of March. While it was "out", he claimed Grasso called and offered to buy his remaining few customers in Milford. (185a, 186a) After Caron resumed service at the market, he claimed he received a storm of phone calls from Grasso and Pellegrino, "as many as four or five in one hour" during the last two weeks in March. (187a) Although his wife received some of them, he took "roughly ten within a week". (189a) Grasso kept repeating the fact the customer was his and that Caron should keep away; Pellegrino again stated that Caron was "fooling with the wrong people". (190a)

By late March, Caron had moved in on another C & A account, the Milford Rivet Company, which he started servicing on April 1st. (191a) Bridgeport Independent Refuse Collectors Association (BIRCA) had been for some years prior to 1967 just what the name implies, a loose trade and social federation of the competing rubbish collectors in and around Bridgeport. Pellegrino (a member). and Grasso caused a special meeting of the group to be called on the evening of April 7th, by speaking with the president of the group, William Lockwood. Caron, with his father, and two other members, Joseph Pauley and Charles Williams, went to the meeting that evening in Fairfield, Connecticut, at the garage of one of the members, Reliable Sanitation. On the way there, he stopped and picked up a pocket radio transmitter from a state police trooper.

At the meeting, Pellegrino introduced Grasso and Tropiano and turned the floor over to the former. Grasso told the members (about *15* of whom were present) that he had bought several routes in Milford, and that Caron should keep away from his customers. (242a) The conversation was in heated tones, and Grasso angrily warned the membership that if they didn't cooperate to keep Caron out of Milford, he would purchase trucks, and send them into Bridgeport equipped with "enough muscle" to give the local people "a rough time". (243a) When Caron asserted his right to do business where he chose, Grasso stated, according to the complainant, that "where he comes from in New York, guys like me they know how to take care of me; I would end up with either my arms broke or in the river". (244a) Grasso also was supposed to have said that "you can stretch a rubber band just so far and its going to break and somebodys going to get hurt." (245a) Tropiano stated he had the money to buy the trucks and furnish the muscle if Caron were not persuaded to stop servicing Milford customers. (245a)

After the general open meeting, Caron stated Tropiano and Grasso spoke with some of the other members, notably Lockwood, in a back room. After that meeting, Lockwood emerged, "flushed", and suggested that he switch some Shelton accounts with Caron's Milford accounts, for pickup purposes, since Lockwood's company, Call Peter, Inc., was already doing a significant business in Milford; each, however, would continue to collect from his own accounts. (266a)

Caron, in order to convince the defendants, and the membership, that he was charging Milford Rivet far more than C & A had, told the membership he was getting $125 a month for the stop as compared with the $65 which had

been paid to the defendants. After the meeting of April 7, Caron arranged to have Milford Rivet issue such a false purchase order which he gave to Pellegrino on or about April 10th. (257a) A week or so later he received a call from Pellegrino who said he was "a fool + + + that I had a very nice family and that it would be a shame if something happened to my children on the way to school, or my wife." (259a) Caron did nothing concerning either Jo-Nicks or Milford Rivet, but he stated he took his children off the school bus and had his wife drive them to and from school. (259a)

From the time of the last Pellegrino phone call in mid-April until July 4, 1967, Caron did not see or hear from any of the defendants. (260a) On that date, Grasso arrived uninvited at Caron's house and asked what he had decided on the stops, and when Caron would stop servicing them. Caron refused to stop servicing the accounts, but told Grasso that "if there would be no more trouble" he would solicit no more business in Milford. (261a, 262a) In fact, he stated, he solicited no further stops from C & A. It was not claimed that Grasso actually made any threats at the July 4 meeting.

Basically, the only significant corroborations of Caron's story came from his wife. To be sure, two state police officers stated that, on a number of occasions when they met with the Carons during March or April of 1967, one or both of them appeared frightened or distraught. The manager of Milford Rivet and the owner of Jo-Nicks both indicated Grasso had attempted to save each account. Robert Reiss, from Milford Rivet, testified he saw Mrs. Caron on April 10th, and that she was nervous and upset.

Mrs. Caron testified that on one occasion, right after the Jo-Nicks container was reinstalled by Caron, she spoke with

Pellegrino on the phone. (1295a) She quoted him as saying that her husband was playing with a "rough bunch of guys" and asked her to have Caron "lay off before he got hurt." (1296a) She confirmed the obtaining of the false Milford Rivet purchase order and the giving of it to Pellegrino. She testified concerning a Caron-Pellegrino phone conversation which prompted her husband to exclaim (over the phone) that no one was going to hurt his wife and children. (1302a) She offered corroboration that the children were removed from the school bus, and of the fact, but not the conversation, of Grasso's Independence Day visit. (1303a-4a)

Finally, the government offered, at various times, evidence that the reputation of Grasso and/or Tropiano was bad or "very bad".

Although for purposes of weighing the sufficiency of evidence, the government's case must be taken with its best food forward, this court would have a very distorted view of the case based upon the foregoing recitation of the facts. The trial was hotly contested, factually as well as legally, and the jury was out approximately nine hours before returning its verdicts. Cross examination, and half a dozen defense witnesses, brought forth a very different picture than the rather simplistic one put forward by the government. An extraordinary number of inconsistencies, both small and large, appeared in exploration of Caron's story, and the case closed presenting large problems of credibility, to the jury, and complex legal issues to the trial and appellate courts.

There is no question that Caron took a couple of rubbish accounts from C&A; that defendants were upset and attempted either to get the stops back or to be paid for them; that they met with Caron and attended the April 7 meeting.

There was, however, a huge dispute about what kind of "threats" were made, and whether any attempt was made to terrorize Caron or his wife.

It is not our present purpose to catalogue all of the contradictions and inconsistencies, however minute, in the Caron testimony. It is important though, in order for this court to assess the prejudicial nature of any errors made below, to set forth the background of what has been the refuse removel industry in Connecticut, and the many weaknesses and inconsistencies in the government's case. The problem of "competition" had been a troublesome one in the industry for some time—cutthroat competition had often meant that *none* of the rubbish collectors, with their high investment in trucks and equipment, could make money. A "solution" to this problem was the Bridgeport Independent Rubbish Collectors Association, a meeting ground where the various competing firms could avoid customer control by a form of price fixing. (329a-30a) Although Caron haggled and balked concerning whether there was a "rule" or "gentlemen's agreement", (334a-39a) it was clear that a procedure had been set up whereby if one member took another's stop, he would either pay him for it or reimburse him with a stop or stops of roughly comparable value. (340a-45a) Caron himself had, on a number of occasions, invoked "the rule". (342a, 1761a) Frustration, anger and occasional violence were far from unknown; again, Caron himself had once threatened to "drop $5,000 in an envelope" to have a competitor "stopped", in order to keep him away from Caron accounts (369a-71a) It was a common occurrence for a BIRCA meeting to be punctuated by loud and heated argument about the stealing of stops, reimbursement, etc. (1424a-26a, 1504a-5a)

On cross examination of Caron, his version of what hap-

pened broadened tremendously—and the claims of violent threats were denied and contradicted by a host of others who attended the meeting. Caron conceded that Grasso had started his presentation to the BIRCA group by referring to the local rule, and by stating that he felt C & A should be given the same courtesy—payment or reimbursement with another stop. (403a-4a) Rather than the original Caron claim of "territorial restriction"—to keep him out of Milford entirely—it was admitted that Grasso said he would have been perfectly happy with some form of reimbursement, in accordance with the association "rule". (416a) Concerning Caron's original claim that The Furies had descended upon him immediately after he obtained his "first stop" in Milford—Jo-Nicks—this too was later shown to have been false. Caron had been servicing two other accounts in Milford since mid-1966, and obtained two or three others in the early part of 1967, the very period covered by the indictment, about which he was never bothered. (556a-61a, 606a-7a, 626a-33a).

The testimonial and documentary evidence contradicting Caron was also impressive, and most apparent concerning the April 7th meeting. Significantly, while that was the principal instance where corroboration of Caron's story was available, corroboration simply was not forthcoming. Caron's father, who accompanied him to the meeting, was not called as a witness. In addition to the complaining witness, eight persons testified concerning the meeting. It is conceded, and was generally agreed by the witnesses, that the tone of the meeting got hot at times. Virtually every one of the witnesses stated that heated discussions and arguments during meetings were a commonplace. Two of the members, Leon Gillick and Joseph Pauley, remembered some remark about a rubber band stretching; (1246a,

1597a) Gillick rather thought it a joke and Pauley couldn't remember who said it. (1258a, 1270a, 1597a) Gillick seemed to remember a remark about "muscle" on the trucks, but he had told the Federal agents earlier in the year only that Grasso had threatened to send trucks into Bridgeport and cut prices. (1259a, 1265a-6a) *Each one* of the eight other witnesses denied hearing Grasso make any threat concerning Caron ending up with broken bones or in the river. *Each one* denied hearing any threats to keep "the members" out of Milford. Virtually all of them stated that, except for the presence of the two non-members, the meeting was about like all other meetings. All said that Caron looked and behaved perfectly normally and did not appear frightened in any way.

The Court may be wondering, at this point, what happened to the portable radio transmitter which Caron took with him to the meeting. Trooper Paige had given it to Caron, equipped with a three foot antenna down his sleeve. The set was rated to work up to a mile or two under good conditions, (1609a) and had been tested earlier in the day at a range of 150 feet and had been working fine. (1604a-5a) That evening, for some reason vaguely ascribed to the weather and/or an intervening cinder block wall (with windows), Trooper Paige couldn't hear anything significant that was said, *twenty feet away*. (1600a-06a)

The presence of the police is an interesting story. Although Caron testified that, at that time, he did not consider the conversations of March 2, 1967, as threats, within two days he ended up, with his wife, at the *house* of a state police lieutenant, ordinarily stationed in Hartford, after Caron, a complete stranger, had called him at home. (1272a, 1282a-83a) An investigation was begun immediately. In addition to the transmitter placed with Caron on April 7,

recording machines were placed on his telephone to record all the damning violent threats coming in by the dozens. Somehow, things didn't work out that way. Although recording devices were operative on Caron's phone for a period of between two and three weeks in March and April, only two calls with any of the defendants were taped (although many other calls were recorded). One was an innocuous short conversation with Pellegrino which neither side offered. The other, however, a conversation with Grasso on March 23, 1967, is of great significance. The transcript of that talk, along with a conversation between Caron and Reiss (the manager at Milford Rivet) have been reproduced in the appendix and we ask the court carefully to examine them. (1760a-68a)

It is clear that Caron, Reiss and the state police had been working together. Knowing that Caron was going to take the Milford Rivet stop from C & A on April 1st, it very much appears as if they were attempting to provoke Grasso into criminal threats. The conversation between Caron and Grasso clearly indicates they had been talking about the former's attempt to take Milford Rivet from the defendants —clearly inconsistent with the "fear" and elaborate deception which allegedly prompted Caron to remove his container from Jo-Nicks. Immediately Caron told Grasso that he had just received a purchase order from Milford Rivet— which was a deliberate falsehood, and obviously provocative —if what Caron said about being pushed "way out" of Milford were true. Later, after further discussion about Milford Rivet, the fact that Jo-Nicks was hauling its own rubbish, and small talk, Grasso asked about Caron's other three Milford accounts—and again Caron was deliberately provocative, saying, "Well I think I'm gonna keep them. I think we're gonna build a little business out here". In the entire

conversation, there was not a single threat, veiled or otherwise. The simple fact about the government's case was that, notwithstanding state policemen running around with recording and transmitting devices, notwithstanding fifteen or so alleged witnesses to the alleged worst of the threats, the case is absolutely bare of support other than the Carons themselves.

The jury learned often, early and well that the defendants were "bad people"—they convicted the "bad people, which is never surprising. We ask the court always to keep in mind the weak, contradictory and hotly disputed nature of the government case when weighing the ensuing claims of error.

REASONS FOR GRANTING THE WRIT

I. False Exculpatory Statements of a Codefendant, Offered Ostensibly Only Against Him as Proof of Consciousness of Guilt, but Which Amount to an Accusation Against This Defendant, Should Not Have Been Admitted in a Joint Trial

Leonard Caron, the government's "star" witness, spent almost a full week on the witness stand. His credibility had been sorely tested, and the numerous gross inconsistencies in his testimony fully explored. Immediately, at this critical juncture, the government called F.B.I. Special Agent Stephen Slifka to testify concerning a January, 1968 interview with the defendant Pellegrino.

Slifka had asked Pellegrino a series of questions concerning his knowledge of the facts relevant to the prosecution and received a series of bald and obvious lies in response. Pellegrino denied being a member of BIRCA (he was in fact a former president of the organization). (805a) He stated that he did not know Tropiano or Grasso, and knew nothing of their refuse business; that he knew Caron and his business, but was unaware of any problem between

Caron and Tropiano-Grasso; that he had never attended a meeting between Caron and the codefendants; that he had never arranged for such a meeting; that he had never attended any meeting of BIRCA, and specifically not the April 7, 1967 meeting. (806a-07a)

All of the above testimony was of course offered against the defendant Pellegrino alone, and the trial court dutifully instructed the jurors that they might consider it only against him. (803a-04a) Defendants Grasso and Tropiano made timely objection in reliance on *Bruton v. United States*, 391 U.S. 123 (1968), arguing that, if anything, Pellegrino's lying about any knowledge of, or connection with, the other defendants, and his refusal to admit any knowledge of the crucial April 7th meeting, was in fact much more damning to and accusatory of Grasso and Tropiano than evidence of his own consciousness of guilt. The court, admitting the evidence, for some reason felt that Pellegrino's lies somehow were "concededly not incriminating" against the codefendants—that they expressly "exculpated" them, "taking them out of the meeting and taking them away from any knowledge of defendant Pellegrino". (799a)

Although the trial was a long one, almost four weeks, the government managed to use the Slifka testimony with tremendous effect—against Grasso and Tropiano. Summations to the jury by counsel ran a whole day. The prosecutor said nothing about Pellegrino's lies on his lengthy opening statement, but in his short, forceful closing, the Slifka testimony loomed large. Aside from the "corruption" of crime "subverting" the business processes, Pellegrino's lies were about all the government hammered away at. The way it was done was particularly artistic and effective.

Rebutting the damaging effect of evidence given by the half dozen persons at the meeting who flatly contradicted

Leonard Caron, Mr. Sagarin, the prosecutor, pointed out that there was "another witness" to the meeting of April 7—Agent Slifka—who related vicariously "what Pellegrino said about the meeting". (1673a-74a) After meticulously ticking off each of Pellegrino's obvious lies, Sagarin stated these lies were offered on "one particular legal issue, namely consciousness of guilt". (1675a)

> Did Mr. Pellegrino, when he did do what we claim he did, know that it was wrong? Was he conscious of his guilty intent and his lies to the FBI so that *he was conscious of his guilty intent, he was conscious that it was wrong for him to have been at that meeting, that it was wrong for him to have brought Mr. Grasso and Tropiano there, that it was wrong for him to even know Mr. Grasso or Tropiano, that it was wrong for him to arrange a meeting where threats were made.* (1675a-76a) (Emphasis added)

The government quite clearly did not share the court's conviction as to how "exculpatory" the Slifka testimony was concerning Grasso and Tropiano.

Just as the government highlighted Pellegrino's damning lies, so did the court, in its charge. In taking two full pages to instruct the jury that the Slifka testimony might be considered only "as circumstantial evidence of the defendant Pellegrino's consciousness of guilt", the court again, carefully and thoroughly, recited all of the Pellegrino "denials" —each one patently false.

The Court of Appeals, notwithstanding full citation of the use and effect of the Pellegrino "consciousness of guilt" evidence, without any discussion of the obvious accusatory aspects of that testimony, chose to adopt the naive position of the trial court, when it stated,

> Pellegrino's statement was completely exculpatory as to him and in no way inculpatory as to his co-defendants. As far as Pellegrino was concerned, the denials were offered not as hearsay for the truth of their contents but as a verbal act by Pellegrino contradicted by evidence subsequently placed before the jury from which a guilty conscience might be inferred. When proven to be false, such an exculpatory statement "is circumstantial evidence of 'guilty consciousness' and has independent probative force". . . . Pellegrino's denials *contained no accusation against his co-defendants* and were not offered for that purpose. (22A)*

In light of the disputed evidence as to what happened at the crucial April 7th meeting, and how Pellegrino's lies were exploited by the government, we humbly submit that both courts below erroneously ignored the incriminating and highly prejudicial nature of Pellegrino's hearsay "accusation" of his fellow defendants.

The scope of this court's decision in *Bruton* is still uncertain and undefined. *Bruton* itself, of course, involved a full confession made by one of two defendants, implicating both of them. The trial court, in admitting the confession in a joint trial, cautioned the jury in accordance with *Delli Paoli v. United States*, 352 U.S. 232 (1957) that they might only consider the confession as against the accused who made it. Relying on the Sixth Amendment right of confrontation, and following the way pointed out by its earlier decisions in *Pointer v. Texas*, 380 U.S. 400 (1965), *Douglas v. Alabama*, 380 U.S. 415 (1965) and *Jackson v. Denno*, 378 U.S. 368 (1964), the Court overruled *Delli Paoli*, holding that while

* Appendix To Petition; Opinion Below.

> "[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertent . . . . Nevertheless. . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant who stands accused side-by-side with the defendant, are deliberately spread before the jury." *Bruton v. United States*, 391 U.S. 123, at 135-6.

Although *Bruton* involved a full confession directly inculpating a codefendant, neither the language of the Court nor subsequent case law would indicate that the application of the confrontation clause is to be so limited. The Court spoke not of "confessions", but rather of "inadmissible hearsay" and of "powerfully incriminating extrajudicial statements of a codefendant"; the disputed Slifka-Pellegrino "testimony" here qualifies on both counts. The Fifth Circuit, in *Evans v. Dutton*, 400 F. 2d 826 (5 Cir. 1968), held *Bruton* applicable to a non-confession situation where evidence was admitted that a codefendant had stated, "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now". The Second Circuit similarly has applied *Bruton* broadly in *United States v. Jones*, 402 F. 2d 851 (2 Cir. 1968), earlier opinion 374 F. 2d 414 (2 Cir. 1967), vacated and remanded, 392 U.S. 299 (1968). That was a perjury prosecution where the offending evidence was the grand jury testimony of one defendant setting the date of a meeting which, if considered by the jury

against the codefendant, would have supplied evidence indicating *Jones* knew his affidavit—the subject of the prosecution—was false. Since it was "crucial testimony . . . not subject to cross examination", it created "more than a fair likelihood" that the jury had been unable to ignore it in accordance with the instructions of the lower court. Id. at 851. See also *Atwell v. United States*, 398 F. 2d 507 (5 Cir. 1968).

None of the reasons, in logic or in the developing post-*Bruton* case law, justifying the distinguishing of *Bruton*, are here applicable. This is *not* a situation, as in *United States v. Catino*, 403 F. 2d 491 (2 Cir. 1968), where the issues were simple and the person making the statement testified at trial and was available for cross examination. See also *United States v. Hoffa*, 402 F. 2d 380 (7 Cir. 1968); *Santoro v. United States*, 388 F. 2d 113 (9 Cir. 1967). The evidence admitted here did not just "creep in . . . inadvertently", a possible exception to the application of *Bruton* mentioned by this Court in its opinion. 391 U.S. at 135. The sole apparent possible justification, and that relied upon by both courts below, was that the evidence simply was not incriminating or harmful in any way to Tropiano and Grasso. *Cortez v. United States*, 405 F. 2d. 875 (9 Cir. 1968). Such a thesis, however, simply cannot stand analytical scrutiny; doubtless that is why the Court of Appeals simply *said it* without any attempt to discuss or explain off the obviously incriminating effect of the way it was used by the government.

In its offer, the government likened Pellegrino's patently false exculpatory statements to evidence that a defendant had fled—both evidence of "consciousness of guilt" of that defendant, and in no way harming or incriminating code-

fendants. The absurdity of the comparison (as to the co-defendants) is immediately apparent. While a suspect's flight can only bear on his own knowledge of guilt, here Pellegrino lied in response to a series of questions concerning his knowledge of and relations with his codefendants, and of the events of a particular evening concerning which nine persons, both for prosecution and defense, testified that Pellegrino had been with his codefendants. While flight may often be used to point to an accused as "the one", the question in the case at bar was not "who" did it, but *whether anything criminal* was done. Indeed, every single witness testified that Pellegrino did *nothing at the meeting* on April 7, save introduce Grasso. Any consciousness of guilt Pellegrino could conceivably have been demonstrating in his lies to Agent Slifka *would have had to have been derivative from some consciousness of Grasso's guilt,* and that of Tropiano. It was, in short, a circumstantial accusation of his codefendants. The government certainly used it that way. (1673a-6a)

The bland passing off, by both lower courts, of such evidence as "exculpatory" regarding Grasso simply cannot withstand the light of reason. If such evidence was so helpful and exculpatory to the defendants, it is strange that counsel fought so hard to keep it out, and the government to get it in—but it is we suppose possible that counsel on both sides were something short of knowledgeable as to what was in their clients' best interests. When we look to how the government used the evidence, however, it is clear just how important it was in convicting *all* defendants. Carefully saving "the best for last"—at the very end of its rebuttal—the government used Pellegrino's lies as what he "said about the meeting"; that he knew it was "wrong" to even be at the meeting, wrong to have brought the code-

fendants there, wrong *even to have known them,* wrong to "arrange a meeting where threats were made".

One of the crucial issues at the trial was exactly what went on at the April 7 meeting; it was, after all, one of the only incidents where Caron's claims could have been corroborated. The evidence largely was in flat contradiction of the government's claims; into that background, the court allowed Pellegrino's out of court hearsay accusation of his codefendants, which was not subject to cross examination. Consistent with this Court's decision in *Bruton,* that evidence should have been excluded in a joint trial. Rather than allow the lower courts to emasculate *Bruton* by decisions such as this one, the Court should grant *certiorari* and make it clear that the protection afforded by the confrontation clause is broad and meaningful, not grudging and illusory.

II. Prejudicial Pretrial Publicity Required, In Order That the Trial Court Might Rule Intelligently on Motions for Change of Venue or Continuance, a Meaningful, Individual Voir Dire of the Potential Jurors

The publicity surrounding the instant case began more than a month prior to the indictment. After a hearing on a motion to quash a grand jury subpoena in early February, 1968, The Assistant U.S. Attorney then in charge of the case, Samuel Heyman, was quoted on the back page of the New Haven Register, as saying that the grand jury investigation involved Tropiano, then free on appeal of a 3 to 6 year prison term, and C & A Refuse Removal Co. Grasso was identified as one of Tropiano's partners.* (53a) That

* We concede that the publicity was worst concerning Tropiano. However, Grasso was constantly linked with him as his partner or right hand man. Coupled with the continual references to organized crime, we think it clear that if read, the publicity would have been terribly prejudicial to Grasso also.

weekend, apparently springboarding from Heyman's disclosures, an incredibly vicious and damaging article appeared in the Connecticut Sunday Herald. (54a) Starting in its first paragraph with "the ugly head and stench of organized crime" infiltrating the refuse business, the "story" continued in a similar, and even more strident, vein throughout. Tropiano and Grasso were described as "dreaded names", the former an "ex-convict" whom police had been watching "for years in line with efforts to prevent hoodlums from gaining a foothold in the area", and the latter as his "No. One Cohort" also with a "police record". It went on to recite with great particularity, and considerable hyperbole and inaccuracy, Tropiano's record—incarceration at Elmira and Sing Sing (on a 13-14 year sentence when he was "paroled on good behavior before serving much of the sentence"*)—and proceeded on to "arrests" for kidnapping, robbery first and second degree, burglary and grand larceny. The paper even catalogued the fact that Tropiano was "one of the first persons brought in for questioning" in connection with a "gangland slaying" in 1963, but that after two hours of "grilling", all he had stated was his name, address and that he was a "grape salesman". The article is, in short, unbelievably prejudicial; it must be read in full. (54a)

Immediately after indictment, in late March, Prosecutor Heyman told the newspapers that the investigation had been "prompted by complaints from a number of private carting companies" and that the charges against defendants "arose largely from their attempts to impose territorial restrictions" which "for a time" were successful, resulting in "increased cost for hundreds of retail stores, factories and other commercial establishments". (56a) The Sunday

* His conviction was actually reversed for lack of evidence, and the case never retried.

Herald took the occasion of the indictment as an excuse again to repeat the highly inflammatory material in its earlier story headed, "MOB BLEEDS BUSINESS". (58a-59a) Tropiano and Grasso were repeatedly linked with the "Mob"—the "Mafia, Cosa Nostra or whatever the crime syndicates are called". A radio interview of Mr. Heyman contained questions concerning Tropiano and his "rank" in the Mafia. (78a-79a)

Between early April and the time of trial, the publicity cooled considerably. During that time, there were seven or eight small stories, almost always on the rear page (the main city news page) of the New Haven Register. These articles appeared generally at times of filing of or hearing on motions, continuances, and assignments for trial. Although there was very little, if any, further highly inflammatory *personal* information concerning the accused or their activities, each article invariably alluded to the case as having resulted from a year long investigation of the "infiltration" by "organized crime" into business, thereby reinvoking most of the earlier ghosts.

Defendants Grasso and Tropiano filed a number of motions addressed to the problem of adverse and prejudicial publicity, including a Motion for Change of Venue, Continuance and/or Trial in Hartford. (135a-152a) Among the appended exhibits was an affidavit by Charles Kiesler, Associate Professor of Psychology at Yale, who stated that the articles in question "might well" cause the reader to be "negatively oriented toward the defendants." (150a-151a) Although such influence might expect to decay over a period of time, a subsequent reminder might well bring back the "negative attitude"—even if, in good faith, a juror might not remember, under pre-trial questioning, having read the earlier newspaper articles.

Judge Timbers denied the Motion for Change of Venue, without prejudice to renewal at Time of Trial. It was in fact renewed (159a) along with a Motion for Individual Voir Dire by Counsel or the Court for the purpose of exploring the effect, if any, of the publicity. The latter motion was denied summarily, and upon questioning by the court, *en bloc, only two* of the seventy odd veniremen remembered, or admitted having read *anything* about the case, and in both instances that involved an article printed the Friday before the start of trial about its assignment for a hearing. That article did contain the by-then-standard reference to the "infiltration of organized crime". The court then also denied the Motion for Change of Venue.

Although there has been a tremendous amount of discussion concerning the policy considerations of "fair trial v. free press", the decisional law, for lack of easily applicable simple rules, has been forced to grope along on a case by case basis. Although most of the earlier cases had required a showing of actual prejudice, the tremendous impact of the modern mass media coupled with the difficulty of showing actual prejudice, have in recent years brought forth a rule indicating that in some cases a remedy would be granted if there is a "probability that prejudice will result." *Estes v. Texas*, 381, U.S. 532, 542-3 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 352-3 (1966). We would concede, of course, that this case did not involve the kind of Roman Holiday atmosphere surrounding the trial of Billy Sol Estes, nor near the volume of coverage spawned by the murder of Marilyn Sheppard, and the arrest and trial of Dr. Sam. However, the wildly prejudicial nature of the two Sunday Herald articles make the possibility, or probability, of prejudice a real problem here. See also *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Pamplin v. Mason*, 364 F. 2d 1 (5 Cir. 1966).

The very result here obtained by the court's questioning of the veniremen is graphic proof, we think, of the fact that such interrogation simply does not work. There is *no way* that—considering the apparent notoriety of the accused and the eye catching nature of the crime and reporting — none of the potential jurors were familiar with the case or the defendants. Such mass questioning, especially concerning questions of prejudicial publicity, has been roundly disapproved by the commentators and the courts.

> "Whenever there is believed to be a *significant possibility* that individual talesmen will be ineligible to serve *because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors.* An accurate record of this examination shall be kept, by court reporter or tape recording whenever possible. The questioning shall be conducted for the *purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have.*
>
> American Bar Association Project on Minimum Standards for Criminal Justice, Fair Trial and Free Press, Sec. 3.4 (a) (Emphasis Added)

The A.B.A. standards, first published in tentative draft form in 1966, and approved by the House of Delegates in February of 1968, are expressive of the developing case law in this area. In 1959, This Court reversed a conviction, in *Marshall v. United States*, 360 U.S. 310 (1959), where in-

formation as to prior convictions had come to the attention of seven jurors through newspaper articles. The conviction was vitiated *notwithstanding* the fact that all seven jurors stated they would not be influenced by the articles, and felt no prejudice against the accused as a result of the news stories — simply because the *probability* of prejudice was high. A short time later, in *Coppedge v. United States*, 272 F. 2d 504 (D.C. Cir. 1959), the Court of Appeals, in a situation where four of the jurors admitted seeing a newspaper article prejudicial to the defendant, stated,

> In view of the nature of the articles the court should have made a careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles.
>
> 272 F. 2d at 508.

What is proper as the fairest and best means of ascertaining *the effect of exposure* is equally proper, fair, and necessary in determining *the fact of exposure*. The courts, as well as the A.B.A., have recognized this. In *Mares v. United States*, 383 F.2d 805 (10 Cir. 1967), a prejudicial article (an excluded confession) appeared during the trial. The accused moved for a mistrial, which was denied, and *never moved* for a voir dire of the jury, individual or otherwise. Nonetheless, the court reversed, stating,

> The nature of this was such that the trial court should have immediately ascertained whether any jurors had been exposed to it; this could have been done without any reference to the nature of the article. *It should have been done by a careful examination of each juror out of the presence of the remaining jurors.*
>
> 383 F.2d 805, at 809 (Emphasis Added)

Perhaps the closest case to point is *Patriarca v. United States*, 402 F.2d 314 (1 Cir. 1968). There, as here, the accused had been widely labeled as a Cosa Nostra chieftain. There, as here, the worst of the publicity was many months before the actual trial. There was a rash of publicity about a month before the trial arising out of the bombing of an attorney for a co-conspirator who was the government's principal witness at the trial; in none of the articles, however, were the defendants connected with the bombing, the Mafia or the Cosa Nostra. The First Circuit held that, under the circumstances, the trial court had not "abused its discretion" in denying a change of venue, especially in view of the fact they did not find any

> suggestion of the kind of prejudicial statements or records of convictions, arrests, or indictments emanating from a public official . . . pejorative characterizations of a defendant, description of evidence against the accused . . . cited as presenting the 'greatest hazards' to a fair trial by the A.B.A. . . .
>
> 402 F.2d at 317

Here we have *all* of those things present.* Tropiano's lurid background, and Grasso's close connection with him, left little to the imagination. The characterizations of them

* The "evidence" given to the newspapers is particularly aggravating. Although Heyman told the newspapers that the defendants had been imposing "territorial restrictions" which had been "successful" for a time resulting in higher prices to businessmen, there was not a shred of such evidence offered. Indeed, it was clear that other companies, besides that of the accused, were operating in Milford, that Caron never even claimed to have been bothered about other Milford stops he obtained, and that when C & A sold the route, the purchaser almost uniformly raised prices tremendously. The deliberate dissemination of prejudicial information by the prosecution has always been treated much more seriously by the courts. *United States v. Desist*, 384 F.2d 889, 904 (2 Cir. 1967).

were about as pejorative as one can imagine. Also, in sharp contrast to *Patriarca,* here an individual voir dire was specifically requested in writing, before swearing of the veniremen, on the question of the publicity. The court, significantly, added in *Patriarca,*

> While the court did all that was requested at this juncture, and cannot under the circumstances of this case be charged with error in not inquiring further, sua sponte, we feel bound to concede that *such a single question posed to the panel en bloc, with an absence of response, achieves little or nothing by way of identifying, weighing, or removing any prejudice from prior publicity.* In cases where there is, in the opinion of the court a significant possibility that jurors have been exposed to potentially prejudicial material, and on request of counsel, we think that the court should proceed to examine each of the prospective jurors, with a view to eliciting the kind and degree of his exposure to the case or the parties, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence. In this we are in accord with the suggestions of section 3.4 of A.B.A., Standards Relating to Fair Trial and Free Press, (Tentative Draft, Dec. 1966, pp. 130-137.
>
> 402 F.2d at 318 (Emphasis Added)

See also *Silverthorne v. United States,* 400 F.2d 627 (9 Cir. 1968)

The answers—or lack thereof—obtained from the veniremen here, and in *Patriarca,* are graphic proof of the fact that "herd questioning" "achieves little or nothing by way of identifying, weighing, or removing any prejudice from prior publicity." It is difficult to see how anyone here could

deny a "significant possibility" that jurors had been exposed to the clearly prejudicial publicity. They all read, and newspapers are sold to be read; most of them lived in areas covered either by the New Haven Register or the Sunday Herald. The day has, we hope, passed when a Motion for Change of Venue can be swept under the rug by bloc questioning of the jury, and its attendant, predictable lack of response.

The problem presented here, as indicated by the *Mares, Silverthorne* and *Patriarca* cases, is an increasingly prevalent one, especially in the case dealing with the spectacular crime or the allegedly notorious accused. This court should not leave the lower courts in uncertainty and chaos as to how best to handle the chore of picking juries as free from the taint of harmful publicity as possible. The proper administration of criminal justice in our courts demands that this Court give guidance to Federal trial judges faced with potentially "infected" veniremen. In addition, the Court should grant certiorari to resolve the apparent difference among circuits — the First, Ninth and District of Columbia having adopted the A.B.A. guidelines or something very much like them, and the Second Circuit here having adopted a rule leaving it almost totally in the discretion of the lower courts. Such a rule is, we think, unfair and unwise; we ask this Court to change it.

III. The Courts Below Misdefined the Scope of the Hobbs Act and Misinterpreted a Number of its Provisions

A. Not Every Robbery at or Extortion of a Corner Grocery is a Hobbs Act Violation and a "Federal Case"

Leonard Caron testified that his company used front end loading Dempster refuse removal trucks. (173a) Each account is furnished with a receptable customed to be used with the truck. (174a) Both trucks and containers were purchased through Lovard Corporation, in Syracuse, New York, and were manufactured in and shipped from Knoxville, Tennessee. (174a) The judge charged the jury that if they believed the above facts – alone – true, they *must* find the commerce element of the statute to have been proved. (1692a-93a)

Caron installed one small container at Jo-Nicks which, after originally removing and returning it, remained there. (185a, 187a) Lovard Corporation apparently would ship large numbers of containers into Connecticut, which were stored on land of Frank Perrotti & Sons, a refuse collector, in New Haven. (191a-92a) If Caron needed containers, he would go to Perrotti's, pick them up, and sign an order. (192a) Milford Rivet had, prior to April 1, 1967, decided to use Dempster equipment and had prepared a loading dock with Dempster in mind. When Caron took over the Milford Rivet account, he placed a container there. After some experimentation with different size containers, Milford Rivet decided to buy its own receptacles, and Caron's were removed.

Although proof was offered concerning the interstate nature of Milford Rivet's business, none of the alleged threats had anything to do with slowing down or obstructing it in any way.* The court, in its charge, relied solely upon the fact that Caron purchased trucks and equipment from out of state.

* The same is true of Jo-Nicks.

With the exception of the approach taken by the third Circuit in *United States v. Critchley*, 353 F.2d 358 (3 Cir. 1965), the courts appear to have interpreted the commerce clause of the Hobbs Act to the absolute extreme allowable under the Commerce Clause of the Constitution. Thus, in *United States v. Amabile*, 395 F.2d 47 (7 Cir. 1968), an extortion of someone who tangentially did some interstate business, without any threat to stop or obstruct that business, was held to be within the Hobbs Act because the "depletion" of the victim's reserves might have an effect on interstate commerce. See also *United States v. Battaglia*, 394 F.2d 304 (7 Cir. 1968). The Ninth Circuit has recently held that an alleged extortion which had the effect of making the victim change pool tables in his establishment, both pool tables having come in interstate commerce, had enough effect on commerce to be a Hobbs Act extortion. *Battaglia v. United States*, 383 F. 2d 303 (9 Cir. 1967) If those courts really mean what they have said, every $10.00 robbery of a corner grocery store has been transformed into a Hobbs Act violation—a "federal case." Here too the courts below held that *as a matter of law* the use of trucks from out of state, and a container or two by Caron, without regard to the fact that he may have had them in stock, constituted an interference with interstate commerce.

There is *no* businessman — or non-businessman — who does not buy some things from outside the state. The Hobbs Act, if read to proscribe even the most minute effect on interstate commerce, has taken the federal government out of the selective crime fighting business and has put it in on a wholesale and retail basis. There is no indication Congress intended such a far reaching result in the passage of this "anti-racketeering" statute. It is true that the Justice Department has not yet seen fit to use the full extent of its

jurisdiction under the above cases — to try as federal crimes each and every robbery and extortion no matter how remote or minor its effect on commerce. The Courts of Appeals, however, have given to the Department the power to do so or to choose, as they have done, the so-called "bad people" with or without any real effect on commerce. This Court never has defined the scope of the commerce clause of the Hobbs Act; it should do so. Before adopting, explicitly or implicitly, the total wild card approach of the Court of Appeals, we ask the Court to weigh carefully the dissenting positions taken by Judge Swygert in *United States v. Amabile*, 395 F.2d at 54, and by Judge Hastie in *United States v. Stirone*, 262 F.2d 571, 578-9 (3 Cir. 1958).

B. The Vague "Right to do Business" is not "Property" Within the Meaning of the Hobbs Act

The "extortion" set forth and made criminal in the Hobbs Act was not left to common law definition; it was specifically defined as the "obtaining of *property* from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear . . . " 18 U.S.C. §1951. Caron testified that, although allegedly threatened by defendants in order to have him return the accounts he had taken from them, he refused to do so. The only thing he claimed he "gave up" was the "right" to solicit new accounts in Milford.* Whether or not the defendants "obtained" any "property" from Caron was thus a distinct issue, raised both in the argument on the Motion for Judgment of Acquittal (161a-22a) and by Request To Charge. (162a-63a) In both instances, the court overruled defendants' contentions.

* This is taking the broadest possible view of what he gave up, since he never claimed to have been bothered about the non-C & A business he had been getting in Milford.

We do not argue with the thesis that the "right" to solicit new accounts is a "valuable" right — just as the "rights" to "life, liberty and the pursuit of happiness" are valuable. Here, however, the question is *whether Grasso obtained "property"* when Caron said he would no longer solicit accounts in Milford. In support of the thesis that, in so agreeing, Caron gave up, and defendants "obtained" property, the court below cited *Bianchi v. United States*, 219 F.2d 182 (8 Cir. 1955) for the proposition that "property", for purposes of the Hobbs Act "is not limited to physical or tangible property but includes, in a broad sense any valuable right considered as a source or element of wealth." (11A)

Insofar as the definition talks about an "element" of wealth, we can have no drastic objection. When, however, the court speaks of any "right considered as a source . . . of wealth" that language is overbroad. We suppose that the "right" to attend college would ordinarily be considered just as much a "source of wealth" as the general "right" to solicit business from potential customers. Let us consider for a moment the following hypotheticals:

1. Dad, furious because Junior wishes to go to medical school and not come into the family business, threatens to cut Junior out of his will. Junior, only because of "fear" of "economic loss", *Nick v. United States*, 122 F.2d 660 (8 Cir. 1941): *United States v. Compagna*, 146 F.2d 524 (2 Cir. 1944), gives up his "valuable right" to go to med school. Dad's action is clearly "wrongful" as Junior's life should be his own to live. Dad has violated the Hobbs Act.*

* Assuming he did an interstate business, such as a corner grocery store.

2. Socony, seeing the chance to bring in lots of new customers and make lots of money, lowers the price of his gasoline 2 cents. Vacuum, furious, goes to Socony and "threatens" to lower his price 4 cents unless Socony raises his back. Socony, because of "fear" of "economic loss", gives up his valuable "rights" to undercut the market, practice free competition, and make lots of money. A Hobbs Act violation?

Something has to be wrong. The combination of any kind of "fear" being sufficient for a Hobbs Act violation — with any "right" of any kind as "property" would convert the strangest kinds of things into a "federal case" with a 20 year penalty. The absurdity of the result would not be significantly relieved by the fact that the Department of Justice would probably only indict the "bad people".

If "the right to do business in Milford" is "property", how did defendants "obtain" it so as to complete the violation? What could be done with Caron's right to compete? We do not argue, in this day and age for a restrictive definition of property — just one which has *some* contact with reality. All kinds of intangibles may validly be considered "property" — seats on the stock exchange, liquor licenses, I.C.C. rights; we concede that rubbish removal accounts, bought and sold as they are, are probably "property" even without long term contract rights. But to call the amorphous right to solicit business property* is to totally abuse

* The court below pointed to no-compete clauses in the sales of businesses to show that rights to solicit are indeed bought and sold. That we think is a totally different situation; the no-compete agreement is just one of the items which gives the ownership of the accounts, and its accumulated good will, some value — it makes it marketable. A totally different picture is presented when the right to solicit is not coupled with an account itself.

that term as it has always been known to lawyers. The federal courts have often dealt with what was property. In the bankruptcy setting, the Fourth Circuit held that, "The debtor's right to earn wages in the future and to dispose of the fruits of his labor is not 'property' in any sense in which the bankruptcy statute uses the term, but constitute rather rights and privileges which go to make up a man's liberty and freedom". *Seaboard Small Loan Corporation v. Ottinger*, 50 F.2d 856 (4 Cir. 1931). For purposes of the Clayton and Sherman Acts also, courts have refused to define property nearly so broadly as the court did below. *Peller v. International Boxing Club*, 227 F.2d 593 (7 Cir. 1955); *Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5 Cir. 1966). The use, by Congress, of the expression *"obtaining* of property" simply cannot be squared with the "everything is property" approach of the government and the courts below. Such an approach is totally inconsistent with all case law prior to the Hobbs Act; certainly if Congress meant such an abrupt departure, they would have defined "property" clearly and in detail. Whatever it was Caron claimed to have given up, it was not "property".

C. A Threat of Legal Economic Competition does Not and May Not Qualify as "Force, Violence and Fear" Proscribed by the Hobbs Act

The facts brought out at trial, as set forth *supra*, were in sharp conflict. It was, simply, the government's position, that defendants set out to extort refuse accounts from Caron Refuse Removal, Inc. by a campaign of physical terror directed at Leonard Caron and his family. This was strenuously denied by the defense, which tried to show that "competition" had been a dirty word among refuse collectors in the Bridgeport area for some time; that for some

years it was the general practice if one company tock an account or accounts from his competitor, he would either "buy" it or reimburse him with stops of roughly comparable value; that defendants knew of such rule and asked the organization and Caron to invoke and honor it in this instance; that though loud and angry words were passed, the meeting was typical of simliar disputes which arose all the time; that the only threats made were to start a price war by sending refuse trucks into Bridgeport to solicit business. It was against this background that the court read the jury the statutory definition of extortion. The court went on to inform them that "the 'fear' referred to in the statute is not limited to fear of physical or body injury; it also includes fear of economic loss or injury." (1695a) Timely and pointed exception was taken to the instruction. (1746a-47a)

One of the first homilies a young law student hears is that "hard cases make bad law", and we submit that the present dilemma is a perfect example of that. The statute in listing "wrongful use of actual or threatened force, violence, or fear . . ." has really grouped together apples and oranges. Force or violence is something applied by the accused — and centers on exactly what he did or said; "fear" is something inside the victim and, if read the way the federal courts have construed it, makes totally irrelevant what kinds of threats, if any, were made by the defendants. In effect "actual or threatened force, violence . . ." might just as well not be in the statute.

It is true, and unfortunate in its implications, that the case law has developed that fear "includes fear of violence or of economic loss as well". *Bianchi v. United States*, 219 F.2d at 189. The *Bianchi* court looked to the earlier *Nick*

and *Compagna* cases in the Eighth and Second Circuits for its conclusion. All of the cases which contain such a broad statement concerning the scope of the statutory word "fear" appear to be labor extortion cases, in which the corrupt business agent threatened an illegal strike unless the employer paid him personally. Faced with a situation which appeared so clearly what Congress had in mind with its "anti-racketeering" act the courts expanded the word "fear" so that, if taken as broadly as stated in *Bianchi*, a 20 year maximum penalty would be possible for all kinds of behavior which Congress clearly *did not* intend to be so proscribed.

Simply, our point is that threats of undercutting competition — even if done to establish or perpetuate a form of price fixing — is not the type of conduct which falls within the ambit of the Hobbs Act. Even if fear of "economic loss" is created by such threats, it does not amount to an extortion or attempted extortion.

The Court of Appeals agreed with petitioner to the extent that we contend a threat to undercut prices by competition does not qualify as a Hobbs Act extortion. (26A) The court below then somehow shrugged off the defense claim that the jury should have been instructed (so long as they were charged that Hobbs Act "fear" includes fear of economic loss) that threats to undercut prices could not qualify as causing fear of economic loss. The court stated that "whatever theoretical merit there may be in appellant's contention as to competition, *such an explanation was unnecessary upon the record of this case.*" (27A)

The court seems to have totally ignored the record in making such a statement. There was a substantial dispute

concerning exactly what kind of threats were made to Caron. Half a dozen witnesses testified the *only* threats made at the April 7th meeting were threats of a price war. The charge as given allowed the jury to convict even if they believed defendants' evidence — that nothing was done save threats of undercutting prices. This is hardly a situation of "theoretical merit"; the charge as given gave the government the verdict no matter whose evidence the jury believed. Such an interpretation of the Hobbs Act is untenable.

IV. The Trial Court Should Have Disqualified Itself

A timely motion to disqualify was filed prior to trial, with accompanying affidavits; the propriety of the judge's refusal to recuse himself must be judged as of that time, and based upon the sufficiency of the supporting affidavits. 28 U.S.C. §144. Although a challenged judge may not pass upon the truth of the facts alleged in the affidavits, *Berger v. United States*, 255 U.S. 22 (1921), a judge who recuses himself may read into the record a denial of the truth of the allegations. *United States v. Valenti*, 120 F.Supp. 80 (D.N.J. 1954) The standard to be applied is as follows:

> The test of the sufficiency of the affidavit is whether or not its contents shows that the party making it has a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling.
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> *State ex rel Brown v. Dewell*, 179 So. 695, 697-8 (Fla. 1938)

The motions, and affidavits, filed on behalf of Grasso and Tropiano were of similar thrust, with certain factual dif-

ferences. (37a-134a) Without a single question as to the size and need for such high bonds, Judge Timbers had granted the government request for $100,000 and $25,000 bonds on Tropiano and Grasso upon return of indictments. That evening Grasso was brought before the court on a bail reduction hearing. Although the court day was already over, and no apparent business before the court, defendants waited between 30 and 45 minutes for the judge to take the bench, during all of which time the judge had Assistant U.S. Attorney Heyman in his chambers, without defense counsel. Heyman had, a month earlier, been quoted in the newspapers as having given information prejudicial to the defendants to the press, which caused terribly prejudicial articles to be published. Grasso felt that Heyman had been busy, during the time spent in chambers, prejudicing the judge against him.

The "finding" of the Court of Appeals that the "mere presence" of the prosecutor in judge's chambers was "incidentally + + + devoted solely to administrative matters" was totally unjustified and grossly improper. We *don't know* what was going on while they were closeted together, keeping the defendants waiting and the fact that defense counsel was not invited strongly supports the reasonableness of Grasso's feeling that his cause was being prejudiced. Disqualification of judges has to do with the impression given to the public and the defendant—and it would be an unusual accused who did not get paranoiac about the prosecutor spending a lot of time *alone* with the judge, followed by the court giving the government everything it asked for.

In the hearing, Heyman offered statements substantially beyond those factors relevant under the Bail Reform Act,

18 U.S. C. §3146, including a serious conviction of Tropiano, which had been reversed on appeal; the fact that Tropiano reported on income of $30,000 per year "which, from all the Government's evidence, indicates that that's considerably understated"; that Grasso "operates Mr. Tropiano's gambling operation here in New Haven, from which there is substantial profits". The court again ordered the bonds set at $100,000 and $25,000, and further ordered, at the request of the government, that if either defendant possessed a passport it be surrendered.

An attached affidavit was offered to show that the bonds set were far out of line with bonds set in similar cases under the Bail Reform Act, especially since Grasso had no prior felony convictions and life long ties with the community.

In an earlier case involving a hearing on reduction of bail, Judge Timbers had indicated that counsel should, if possible, attempt to settle on a bail figure; failing that, the court having heard the criminal records of the defendants, it would have to be disqualified. (75a-77a) The fact that, in this case, the court resisted such a disqualification, led the accused further to question the impartiality of the court.

Because the actual state of the judge's mind cannot be known, the determination to be made is not whether the judge is actually biased or prejudiced, but whether the affiant has alleged facts from which bias or prejudice may be inferred. The facts alleged must give fair support to the charge of bias, and must justify a reasonable apprehension on the part of the affiant that the judge may be biased.

We submit the affidavits submitted establish sufficient support for the defendant's fear that court might be preju-

diced against him. Although adverse rulings, such as on the bond hearing, do not alone prove bias, *United States ex rel Rogers v. Richmond,* 178 F. Supp. 44 (D. Conn. 1958), such rulings may be considered as against rulings in similar cases with different parties. *State ex rel McAllister v. State,* 214 S.W. 85, 89 (Mo. 1919). Here, not only did the accused feel the bond was totally out of line, but he also could point to the fact that the court was treating his case differently from what he had stated a year before concerning disqualification. The judge had spent a long time, after the close of court, just before the bail hearing, alone with a prosecutor, who based upon his actions and statements, the accused had good reason to fear was extremely hostile toward him. We submit enough was set forth in the affidavits so that the image of justice required the court to recuse itself.

V. The Admission Into Evidence of a Telephone Recording, Taped with the Consent of the Complaining Witness, Violated the Constitutional Rigts of the Accused

As set forth supra, the complaining witness Leonard Caron agreed to allow the Connecticut State Police to place a recording device on his telephone, which was done for a period of more than two weeks in March and April of 1967. The government successfully offered at trial large portions of a recorded conversation between Caron and Peter Bertase.

Presently pending before this Court is *United States v. White,* 405 F. 2d 838 (7 Cir. 1969), cert. granted 394 U.S. 957 (1969), in which the Seventh Circuit held that the use of recordings obtained with the permission or connivance of a party to the conversation violated the Fourth Amendment.

Depending upon the decision of the Court in *White*, it may have been error for the courts below to have admitted the taped conversation into evidence. We ask the Court to consider this point in the light of its forthcoming decision in *White*.

ADOPTION OF ISSUES RAISED BY AND REASONS ADVANCED FOR ISSUANCE OF WRIT ON BEHALF OF CODEFENDANT TROPIANO

The petitioner hereby joins in any and all issues to be raised and questions to be presented by the codefendant Tropiano in his Petition for Certiorari which will be filed in February, said codefendant having sought and obtained an extension of time for filing of his Petition, including but not limited to the claim that the jury selection system here utilized was unconstitutionally vague and violative of the petitioner's due process rights, which points were raised below and are substantially similar to the issues raised in *Carter v. Greene Cty. Jury Comm., #30, argued 10/21/69.*

CONCLUSION

1. Each of the issues presented herein poses important questions of federal criminal law which should be decided by this Court.

2. The decision of the court below conflicts with this Court's mandate in *Bruton v. United States*, 391 U.S. 123 (1968).

3. The decision below concerning an individual voir dire of jurors is in conflict with the position taken by the First, Ninth, Tenth and District of Columbia circuits.

The writ of certiorari should be granted.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that court herein, being the case numbered and entitled in its docket No. 33092 *"United States vs. Ralph Tropiano, et al,"* and that the judgment of that court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated this 19th day of January, 1970.

WILLIAM GRASSO
Petitioner

By IRA B. GRUDBERG, Esq.
Attorney for Petitioner

JACOBS, JACOBS, GRUDBERG & CLIFFORD
With him on the Petition

APPENDIX

OPINION BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 702-3-4—September Term, 1968.

(Argued July 24, 1969 Decided November 26, 1969.)

Docket Nos. 33092-3-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

RALPH "WHITEY" TROPIANO, LAWRENCE R. PELLEGRINO and WILLIAM GRASSO,

Defendants-Appellants.

Before:

WATERMAN and HAYS, *Circuit Judges,*
BARTELS, *District Judge.**

* Of the Eastern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the District of Connecticut, Timbers, *J.*, convicting the defendants of violations of the Hobbs Act, 18 U.S.C.A. §1951. Affirmed.

BARTELS, *District Judge*:

On March 27, 1968, the appellants were indicted in New Haven, Connecticut, in a four-count indictment, charging them with wilfully and knowingly attempting to and actually obstructing, delaying and affecting interstate commerce and the movement of supplies from outside Connecticut by extorting and attempting to extort property from certain refuse removal dealers by the wrongful use of threatened force, violence and fear, in violation of the Hobbs Act, 18 U.S.C.A. §1951.[1] Counts 1, 2 and 3 of the indictment

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1 The pertinent portions of Section 1951 read as follows:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all

charged substantive violations of the Hobbs Act, while Count 4 charged conspiracy under the same Act. Tropiano and Grasso were named only in Counts 1, 2, and 4, while Pellegrino was named in all counts. The Court ordered an acquittal of all appellants as to Count 2, and a severance as to Count 3 relating to Pellegrino alone.

After a trial of eighteen days, the jury on November 15, 1968, returned a verdict of guilty against all the appellants accused in Count 1, and against all, except Pellegrino, accused in Count 4—the conspiracy charge. Tropiano was sentenced to twelve years imprisonment on each count, to be served concurrently, and a $10,000 fine on Count 1; Grasso was sentenced to ten years imprisonment on each count, to be served concurrently, and a $7,500 fine on Count 1; and Pellegrino was sentenced to eight years imprisonment and a $5,000 fine on Count 1.

It is undisputed that Tropiano and Grasso together with Dolores Proto were partners in the C & A Refuse Removal Company (hereafter C & A), engaged in the business of collecting rubbish, with customers or "stops" in Milford, Connecticut; that Pellegrino was likewise engaged through B & L Carting Corporation in Bridgeport, Connecticut; and that Leonard Caron, with the help of his wife Ruth, ran a family-owned company under the name of Caron Refuse Removal, Inc., similarly engaged in the rubbish removal business in the Bridgeport area.

The thrust of the Government's case was that when Caron's company replaced C & A in servicing one or more of the C & A's Milford "stops," Tropiano, Grasso and Pel-

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commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

legrino, by threats of violence, forced Caron to cease and desist from attempting to take away any more C & A's Milford "stops" and to consent not to solicit any more business in that area. This contention rested almost entirely upon the testimony of Leonard Caron, supported in parts by the testimony of his wife and corroborated in peripheral areas by several other witnesses. The appellants charge, among other things, that the testimony of Caron and his wife was incredible as a matter of law. It is thus in order to examine this testimony which, in essence, reveals the following:

Jo-Nick's and Milford Rivet "Stops"

Caron moved to Milford in 1966 and decided that he would begin servicing Milford private refuse removal customers. At first he serviced two or three "virgin" accounts which had not been previously serviced. Then late in February, 1967, he began servicing the grocery store by the name of Jo-Nick's, located a block from his home, which prior thereto had been serviced by C & A. Thereafter, on March 2, 1967, Caron received a telephone call from Pellegrino, a competitor, at which time the latter stated that Grasso and Tropiano wished to speak to him. Caron invited them to his home but Pellegrino declined, arranging, instead, a meeting at Howard Johnson's restaurant for that evening. Pellegrino picked up Caron in his car and drove him to the restaurant, where Pellegrino introduced Tropiano and Grasso as owners of C & A and also as Pellegrino's partners and backers. At this meeting Grasso said that Jo-Nick's was his account, that Caron should leave it alone and that if Caron did not cooperate, Grasso would push him out of Milford—"way out if he needed to," and Tropiano said "We know how to take care of guys like you."

Caron refused to accede. On the way home Pellegrino told Caron that he was crazy and that "these two men were not to be fooled with," that Caron was liable to get his "head broke or something similar to that." Two days later, on March 4th, Caron and his wife sought the advice of Lieutenant Donald Paige of the Connecticut State Police in Fairfield. Caron shortly thereafter removed the refuse container he had left at Jo-Nick's and discontinued service for approximately two weeks, until the middle of March, when he again resumed service of Jo-Nick's. The resumption of service resulted in a storm of phone calls from Grasso and Pellegrino, during which Grasso kept repeating that the customer was his and that Caron should keep away. Pellegrino again stated that Caron was "fooling with the wrong people." In one call Pellegrino told Mrs. Caron that her husband "was playing with a rough bunch of guys" and that she should tell him "to lay off before he got hurt."

By late March, Milford Rivet Company discontinued its arrangement of service in Milford with C & A and awarded the business to Caron, who began servicing the company on April 1, 1967. Grasso then attempted to induce other refuse removal dealers to exert pressure upon Caron to cease and desist his Milford activities. Accordingly, on April 3rd Grasso and Pellegrino visited Peter Bertase, who with his son-in-law William Lockwood was the owner of Call Peter, Inc., also in the refuse removal business. Grasso advised Bertase, "If I don't get (the stops) back, I'm going to do something about it" or "there would be trouble." He ordered Bertase to call Caron, which he did, attempting to induce Caron to surrender the "stop." Bertase informed Caron that he had a similar problem with Grasso when Bertase had taken five accounts from C & A and "out of five I got one. I gave four back."

The BIRCA Meeting of April 7, 1967

Bridgeport Independent Refuse Collectors' Association (BIRCA) is a refuse collectors' trade and social organization in and around Bridgeport. Pellegrino was a member but Grasso and Tropiano were not. Pellegrino and Grasso caused a special meeting of this group to be called for April 7th by speaking to the president, William Lockwood. Caron with his father and two other members, Joseph Pauley and Charles Williams, attended this meeting in Fairfield, Connecticut, which was held at the garage of the Reliable Sanitation Company, a BIRCA member. On the way Caron stopped and picked up a one-way pocket radio transmitter from Connecticut State Police Trooper David Paige and Lieutenant Pat Carroll of the Fairfield Police Department for protective contact with the police. At the meeting Pellegrino introduced Grasso and Tropiano and turned the meeting over to Grasso, who told the members that Caron should keep away from his customers and that if the members did not cooperate to keep Caron out of Milford, he would purchase trucks and send them into Bridgeport with "enough muscle" to give the local people "a rough time." When Caron asserted his right to do business where he chose, Grasso said, to use Caron's words, "that where he comes from in New York, guys like me they knew how to take [care] of me; I would end up with either my arms broke or in the river," and that "you can stretch a rubber band just so far and it's going to break and somebody is going to get hurt." Tropiano stated that he had the money to buy the trucks and to furnish the muscle if Caron was not persuaded to stop servicing Milford customers. After the open meeting, Tropiano had a conference in the back room, during which he told Lockwood that it was the lat-

ter's duty to obtain the stop from Caron for Tropiano or buy the stop back and give it to C & A or pay C & A directly for the stop. When Caron denied undercutting Grasso's price for the Milford Rivet account, Grasso called Caron a liar. Caron, nevertheless, continued to service this account.

Post BIRCA Meeting

On April 9th, in order to convince Grasso and Tropiano that Caron was not undercutting their service price, Mrs. Caron interviewed Robert Reiss, the manager of Milford Rivet Company, and obtained from him a false purchase order of $125.00 a month, which was given to Pellegrino on April 10th. According to Reiss, she appeared so nervous and disturbed at the time that he made an appointment to see the Mayor of Milford. A week later Caron received a call from Pellegrino, who said Caron was "a fool * * * that I have a very nice family and that it would be a shame if something happened to my children on their way to school, or my wife." Caron did nothing about the two accounts but he took his children off the school bus and had his wife drive them to and from school four times a day. At the same time his home was placed under police surveillance, and Mrs. Caron was in such an emotional state that her doctor prescribed tranquilizers.

Not until the following July 4th did Caron hear from any of the appellants. On that day Grasso arrived uninvited at Caron's home during a family picnic. Caron told Grasso that he would not relinquish the two accounts but he agreed not to solicit any more business in Milford and, specifically, not to solicit any of Grasso's customers. Caron planned to build a business in Milford and his agreement

to surrender this plan was due to fear for himself and family. Caron did not solicit any of Grasso's customers or any further business in Milford thereafter.

Contradictory Testimony

The appellants did not take the stand but they did cross-examine the Carons severely. Upon cross-examination Caron admitted certain errors in his direct testimony including the date when he began servicing new accounts in Milford and the number of phone calls he received from Pellegrino and Grasso, and errors, inaccuracies and inconsistencies between his testimony in court and the statements he made to Assistant United States Attorney Heyman and to the Grand Jury. Mrs. Caron also manifested some confusion and inconsistencies upon cross-examination. Furthermore, appellants called six witnesses who were present at the BIRCA meeting and who contradicted Caron by denying that any threats were made by Grasso or Tropiano at the meeting. There was, however, testimony by the Government witness Lockwood (later declared a hostile witness after attempting to escape from his grand jury testimony) corroborating Caron with respect to Lockwood's meeting with Tropiano in the rear room of the BIRCA meeting place. There was also testimony by Leon Gillick, who was present at the meeting, who testified that he remembered Grasso's statement about bringing trucks from the New Haven area with a few muscle boys, and also Grasso's statement about stretching a rubber band, and by Joseph Pauley, another member present, who remembered a statement being made by someone about stretching a rubber band and also that the whole atmosphere of the meeting was "trouble."

Sufficiency of the Evidence

A witness may be inaccurate, contradictory and even untruthful in some respects and yet be entirely credible in the essentials of his testimony. The Carons' errors, inconsistencies and contradictions were elaborately catalogued in the appellants' summation, and the trial court instructed the jury as to the guidelines to be utilized in determining credibility, including its duty to appraise a witness' reaction when faced with contradictions. Nevertheless, the jury believed the Carons upon those issues crucial to the Government's case. It is the province of the jury and not of the court to resolve discrepancies in a witness' testimony which in any way reflect upon his credibility (*United States ex rel. Anderson* v. *Fay*, 394 F.2d 109 (2d Cir. 1968)) and to choose between competing inferences of fact. *United States* v. *Marchisio*, 344 F.2d 653 (2d Cir. 1965). The Carons' testimony did not stand alone. It was undisputed that there was a meeting of Tropiano, Grasso, Pellegrino, and Caron on March 2, 1968, at Howard Johnson's restaurant, arranged by Pellegrino. Additionally, the Carons' testimony was corroborated by other witnesses on further details establishing the scenario for their story in the following respects: Caron took two "stops" away from C & A; he and his wife went to the Connecticut State Police; he removed his container from Jo-Nick's for two weeks and then returned it; Milford Rivet Company discontinued service with C & A and awarded the business to Caron; Lockwood called a special meeting of BIRCA at the request of Pellegrino and Grasso, although neither Grasso nor Tropiano were members; this meeting was held to consider the problem arising from Caron taking C & A "stops," at which Tropiano, Grasso and Pellegrino were present and at which statements were made about bring-

ing in trucks and "stretching a rubber band"; Bertase called Caron at Grasso's request; Mrs. Caron spoke to Reiss, the manager of Milford Rivet Company, and obtained a false purchase order from him; Caron and Mrs. Caron looked worried and disturbed, and Caron's house was placed under police surveillance.

The jury was free to disbelieve the contradiction by the six BIRCA witnesses, especially in view of the involvement of each in the controversy and Lockwood's effort to retreat from his grand jury testimony. The jury was not required to rely upon words alone but could consider as part of the evidence, the demeanor, bearing, interest and conduct of the witnesses. As aptly phrased by Judge L. Hand: "* * * the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer* v. *MacDougall,* 201 F.2d 265, 269 (2d Cir. 1952). Once, however, the verdict of guilty has been returned, the evidence must be viewed "most favorably to [the Government], which includes * * * the indulgence in all permissible inferences in its favor." *United States* v. *Arterbridge,* 374 F.2d 506 (2d Cir. 1967); *United States* v. *Brown,* 236 F.2d 403, 405 (2d Cir. 1956); *United States* v. *Castellana,* 349 F.2d 264, 267 (2d Cir. 1965), *cert. denied,* 383 U.S. 928 (1966), *reh. denied,* 384 U.S. 923 (1966); *United States* v. *Marchisio, supra.* We find no basis to hold that the Carons' testimony was incredible as a matter of law, or that the evidence was insufficient to support the verdict.

The Hobbs Act

The application of the Hobbs Act to the present facts of this case has been seriously challenged by the appellants

upon the ground that the Government's evidence indicates that no "property" was extorted and that there was no interference or attempted interference with interstate commerce. They assert that nothing more than "the right to do business" in the Milford area was surrendered by Caron and that such a right was not "property" "obtained" by the appellants, as those terms are used in the Act. While they concede that rubbish removal accounts which are purchased and sold are probably property, they argue that the right to solicit business is amorphous and cannot be squared with the Congressional expression in the Act of "obtaining property." The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress had to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States,* 361 U.S. 212, 215 (1960). The concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things (*United States* v. *Provenzano,* 334 F.2d 678 (3d Cir. 1964), *cert. denied,* 379 U.S. 947 (1964); *United States* v. *Nedley,* 255 F.2d 350 (3d Cir. 1958)), but includes, in a broad sense, any valuable right considered as a source or element of wealth (*Bianchi* v. *United States,* 219 F.2d 182 (8th Cir. 1955), *cert. denied,* 349 U.S. 915 (1955), *reh. denied,* 349 U.S. 969 (1955)) and does not depend upon a direct benefit being conferred on the person who obtains the property (*United States* v. *Green,* 350 U.S. 415 (1956)).

Obviously, Caron had a right to solicit business from anyone in any area without any territorial restrictions by the appellants and only by the exercise of such a right could Caron obtain customers whose accounts were admittedly valuable. Some indication of the value of the right to solicit

customers appears from the fact that when the C & A accounts were sold for $53,135, C & A's agreement not to solicit those customers was valued at an additional $15,000. The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution (*Louis K. Ligget Co.* v. *Baldridge*, 278 U.S. 105 (1928); cf., *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465 (1921); *Small* v. *United States*, 333 F.2d 702 (3d Cir. 1964); *Pierce Ford Sales, Inc.* v. *Ford Motor Co.*, 299 F.2d 425 (2d Cir. 1962), *cert. denied*, 371 U.S. 829 (1962)). Caron's right to solicit accounts in Milford, Connecticut constituted property within the Hobbs Act definition.

The second challenge to the application of the Hobbs Act is equally without merit. The phraseology of the Act makes it clear that the interference or attempted interference with interstate commerce "in any way or degree" is prohibited. Stated differently, extortion or threats of violence need affect interstate commerce only in a minimal degree to constitute a violation. The broad and extensive reach of the commerce clause under the Hobbs Act has been upheld in a variety of circumstances. *United States* v. *Amabile*, 395 F.2d 47 (7th Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969); *Battaglia* v. *United States*, 383 F.2d 303 (9th Cir. 1967), *cert. denied*, 390 U.S. 907 (1968); *Hulahan* v. *United States*, 214 F.2d 441, 445 (8th Cir. 1954); *United States* v. *Malinsky*, 19 F.R.D. 426, 428 (S.D.N.Y. 1956). Here Caron employed more efficient, modern and costly Dempster front-end loading refuse removal trucks, operated by means of two mechanical arms which lift the rubbish containers up and over the front

of the truck and dump them into the rear, providing advantages of cleanliness and security. The trucks required specialized containers for each customer. Both the trucks and containers were manufactured by Dempster Corporation in Knoxville, Tennessee, and were purchased by Caron through Lovard Corporation, Dempster's representative in Syracuse, New York, the trucks being shipped at times f.o.b. shipping point directly from Knoxville. After a large shipment, the receptacles were often stored by Lovard in New Haven, from which Caron would pick up containers as needed. Caron served Jo-Nick's with one container and Milford Rivet Company with another container, which after a time was removed for Milford Rivet's own receptacles. The appellants insist that such evidence is insufficient to support any likely obstruction or effect upon interstate commerce. We cannot agree. Interstate commerce was involved and attempted interference, if not actual interference, was clearly established. Caron's surrender of his right to solicit additional customers in Milford automatically limited his future orders for receptacles for new customers and the trucks required to serve such customers.[2] Sufficient evidence, both circumstantial and otherwise, was present to warrant a finding that the conduct of the appellants constituted extortion or attempted extortion which affected interstate commerce within the proscription of the Hobbs Act. *United States* v. *Provenzano, supra; United States* v. *Stirone,* 262 F.2d 571 (3d Cir. 1958), *reversed on other grounds,* 361 U.S. 212 (1960).

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2 Although not mentioned in the Court's charge, the appellants' attempted interference with Caron's relationship with Milford Rivet could be construed as an attempted restraint upon the latter's operational efficiency and consequently an attempted restraint upon interstate commerce, even though in a minimum degree.

Pretrial Rulings

The trial judge is charged by the appellants with numerous errors in his pretrial rulings including his failure to disqualify himself, error in his denial of the challenge to both the grand and petit jury venires, his failure to grant a change of venue, and his failure to permit an individual *voir dire*.

The affidavit for disqualification, submitted under 28 U.S.C.A. §144, alleges "personal bias or prejudice" based upon the factual allegations that the trial judge fixed bonds of $100,000 for Tropiano and $25,000 for Grasso; that he presided at the bail hearing, disclosing the defendants' criminal records, and that prior to the hearing the Chief Assistant United States Attorney was in the judge's chambers. A judge is required to assume the truth of the facts stated in an affidavit for disqualification and to excuse himself when required by those facts. But he is also obligated not to rescue himself when there is an insufficient basis for so doing (*Rosen* v. *Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966)), the test being whether the facts alleged give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States*, 255 U.S. 22, 33-34 (1921); *United States* v. *Hanrahan*, 248 F. Supp. 471 (D.D.C. 1965). The mere fact that the trial judge rendered adverse rulings to a party at a bail hearing or has become familiar with a defendant's prior record does not automatically or inferentially raise an issue of bias or disqualify him from presiding at a trial at which the jury is to determine that person's guilt or innocence. *Lyons* v. *United States*, 325 F.2d 370 (9th Cir. 1963), *cert. denied*, 377 U.S. 969 (1964); *Barry* v. *Sigler*, 373 F.2d 835 (8th Cir. 1967); *United States* v. *Kravitz*, 303 F.2d 700 (3d Cir. 1962), *cert. denied*, 371 U.S. 922

(1962). The mere presence of an Assistant United States Attorney in the judge's chambers, which incidentally in this case was devoted solely to administrative matters, is in the same category.[3] The affidavit was manifestly insufficient.

The Jury Array.

Appellants contend that the array of grand and petit jurors who indicted and convicted them in both instances, was selected in violation of the Federal juror standards set forth in 28 U.S.C.A. §1861[4] as they existed prior to the effective date of the 1968 amendment, and also of their constitutional right to due process. The challenge is directed to the selection of the jurors by the so-called "key man suggestor system," stemming from the Connecticut State juror requirements as set forth in §51-217, Conn. Gen. Stats., and more fully described in *United States* v. *Romano*, 191 F. Supp. 772 (D. Conn. 1961). Pursuant to this system a letter was sent to a number of citizens from a variety of backgrounds, requesting them to suggest to the jury commissioners the names of residents of their communities who they believed would "make qualified jurors for the Federal court" and stating that a prospec-

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3 In his brief Grasso states: "we make no claim that, as a result of what occurred at trial, bias or prejudice was demonstrated."

4 At that time Section 1861 read as follows:

"Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

tive juror, "in addition" to the statutory qualifications, "should be esteemed in his community as a person of good character, approved integrity, and sound judgment."[5] The assault is made on both statutory and constitutional grounds and is based upon a claim that this method of selection violates the Federal juror standards contained in the Civil Rights Act of 1957, amending Section 1861, 28 U.S.C.A. The only disqualifications set forth in this section are limited to age, residence, mental or physical infirmities, felony convictions, and literacy.

While portions of the jury list in this case were selected by the key man suggestor system, other portions were selected at random from voter lists, telephone and city directories.[6] Appellants rely heavily upon *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966), which struck down a jury list compiled by jury commissioners who treated the Federal statutory standards as minimum qualifications, to which they added their own ideas as to good character, intelligence and ability to understand, which in turn resulted in an unrepresentative cross-section of the community and the exclusion from the jury panel of a particular class. That case must be limited to its own facts and is no authority against the key man suggestor

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5 The phrase "in addition" was inappropriate but the letter explained this by adding: "In determining 'esteem,' please keep in mind that this does not require wide public recognition or high place. Integrity, intelligence, sound judgment, a sense of responsibility—in short, all those qualities of a first-class citizen which cause a man to be esteemed by his fellows—are to be found among the *unheralded just as often as among the prominent* * * * In making up this list, we ask that you make a conscious effort to include both men and women from a variety of backgrounds and occupations so as to give us, *as nearly as possible, a representative cross-section of your community.*" (Emphasis supplied.)

6 For example, a venire of petit jurors was selected from 1,252 persons, 510 of whom were selected in accordance with the key man suggestor system and 742 were chosen at random from voter lists, telephone and city directories.

system, for the same Court, in a case[7] heard *en banc* with *Rabinowitz* approved the use of a properly chosen key man suggestor system, and in cases before[8] and after[9] *Rabinowitz* the same court upheld the use of such a system. Congress did not in the 1957 amendment establish a uniform system of providing for the selection of a list of qualified jurors from which grand or petit jurors were to be drawn. *Beatrice Foods Co.* v. *United States*, 312 F.2d 29, 35 (8th Cir. 1963), *cert. denied*, 373 U.S. 904 (1963). The selection process and the choice of specific sources from which names might be drawn were entrusted to the court clerk and jury commissioner. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946); Report of the Judicial Conference Committee on the Operation of the Jury System, 26 F.R.D. 409, 421 (1960).

The 1957 amendment has not been read as prohibiting the adoption of practical and reasonable methods of jury selection which are in no way inconsistent with the Federal standards. *Hoyt* v. *State of Florida*, 368 U.S. 57 (1961); *United States* v. *Henderson*, 298 F.2d 522 (7th Cir. 1962), *cert. denied*, 369 U.S. 878 (1962). There has been no suggestion that the Connecticut selection procedure was not a random selection or that the selection produced by the system did not represent a fair cross-section of the com-

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7 *Brooks* v. *Beto*, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967), *reh. denied*, 386 U.S. 1043 (1967).

8 In *Chance* v. *United States*, 322 F.2d 201 (5th Cir. 1963), *reh. denied*, 331 F.2d 473 (1964), *cert. denied*, 379 U.S. 823 (1964), the same Circuit approved the use of a properly chosen key man suggestor system in two Florida counties where Negro jurors were chosen from citizens recommended by Negro ministers and business leaders.

9 *Hunt* v. *United States*, 400 F.2d 306 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969), where the same Circuit upheld a jury suggestor letter in which the clerk added the additional qualification that the prospective jurors be "esteemed" in their respective communities.

munity or that it operated to exclude any special class or group. As in the past, we hold that the test under the 1957 amendment is not whether a particular method of selection, such as voter registration lists, was employed but whether the use of such a procedure resulted in an array which was a representative cross-section of the community or an array from which a cognizable group or class of qualified citizens has been systematically excluded. *United States* v. *Caci*, 401 F.2d 664 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969), *cert. granted as to other defendants and vacated on other grounds sub nom., Giordano* v. *United States*, 394 U.S. 310 (1969); *United States* v. *Kelly*, 349 F.2d 720, 778 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *United States* v. *Greenberg*, 200 F. Supp. 382 (S.D.N.Y. 1961). The burden was on the appellants to show that the procedure utilized by the partial use of the key man suggestor system did not meet the accepted criteria for Federal jury selection or was inconsistent with the Federal minimums (*United States* v. *Henderson, supra; United States* v. *Ware*, 237 F. Supp. 849 (D.D.C. 1964); *affirmed*, 356 F.2d 787, 790 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 919 (1966)) which burden they have failed to carry. Accordingly, the challenge to the jury array was properly denied.

Pretrial Publicity

In early February, 1968, a motion was made by Dolores Proto to quash a grand jury subpoena. On February 11th, the following weekend, an inflammatory article appeared in the Connecticut Sunday Herald concerning organized crime and relating to Tropiano's criminal background, associating Grasso with him as his number one cohort. After the indictment was returned on March 27, 1968, the Sunday Herald repeated the inflammatory material and linked Tropiano

and Grasso with the Mafia or Cosa Nostra. In a radio interview on March 27, 1968, with the Assistant United States Attorney, questions were raised referring to Tropiano and his rank with the Mafia, with respect to which the Assistant United States Attorney refused to comment. Between that time and the trial on October 23rd, no further inflammatory personal information concerning the activities of the accused appeared in the press.

In May of that year a motion was made by Tropiano and Grasso for a change of venue, which was denied without prejudice and was renewed at the time of the trial in October along with a motion for an individual *voir dire* of the jurors. Both motions were denied and the court then proceeded to question the veniremen *en bloc*. There is no question that the trial court is obligated to provide the defendants with a constitutionally fair trial by affording them protection against the probability of prejudice arising from exposure to inflammatory and prejudicial publicity. *Estes* v. *Texas*, 381 U.S. 532, 542-543 (1965), *reh. denied*, 382 U.S. 875 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333, 352-353 (1966). However, no hard and fast rule of general application can be formulated since the determination of the extent, if any, of the impact of prior adverse publicity depends upon the circumstances of each individual case. But it is well recognized that the passage of time frequently and effectively erodes the impress of the damaging statements upon the minds of the jurors. *Beck* v. *Washington*, 369 U.S. 541, 555-558 (1962), *reh. denied*, 370 U.S. 965 (1962); *Stroble* v. *State of California*, 343 U.S. 181 (1952).

Approximately eight months elapsed between the publication of the pejorative characterizations and the trial in this case. The trial judge asked the prospective jurors on three occasions whether they had heard or read anything about

the case and only two remembered anything about newspaper accounts of the events and these accounts related to an innocuous item, printed the Friday before the trial, relating only to the assignment of the case for trial. The appellants contend that this inquiry was too general and that a personalized *voir dire* was necessary to effect a proper inquiry into the impact on the minds of the jury of the inflammatory publicity, citing a number of cases and, in particular, *Patriarca* v. *United States,* 402 F.2d 314 (1st Cir. 1968), *cert. denied,* 393 U.S. 1022 (1969). We find no factual parallels in the cases cited and none of the hazards to a fair trial described by the ABA, *Standards Relating to Fair Trial and Free Press* (Approved Draft, March, 1968), pp. 25-40. There was no showing that at the date of the trial in October the adverse publicity was fresh in the minds of the community or the jurors or that any remnant of probable prejudice remained from the prior exposure which would require a change of venue. *Beck* v. *Washington, supra; United States* v. *Armone,* 363 F.2d 385, 393-396 (2d Cir. 1966), *cert. denied,* 385 U.S. 957 (1966); *United States* v. *Battaglia,* 394 F.2d 304, 317-318 (7th Cir. 1968). The problem of a personalized *voir dire* rests in the wide discretion of the trial judge (*United States* v. *Bowe,* 360 F.2d 1, 12 (2d Cir. 1966), *cert. denied,* 385 U.S. 961 (1966); *United States* v. *Gillette,* 383 F.2d 843, 849 (9th Cir. 1967)) and we believe the trial court in this instance did all that was required and did not abuse its discretion in denying a personalized *voir dire.*

Evidentiary Rulings

The appellants urge that they were prejudiced by several evidentiary rulings by the trial court, only two of which deserve consideration: one involving the admission of a

false denial by Pellegrino, and the other the admission of evidence of bad reputations of Tropiano and Grasso.

On January 16, 1968, one of the Government's Special Agents, in the process of investigation, interviewed Pellegrino concerning his knowledge of certain facts relevant to the case. Pellegrino denied to the Agent that he was a member of BIRCA (in fact he was a former president); that he knew Tropiano, Grasso or Caron or anything about the refuse business, or of any problem between Caron and Tropiano and Grasso, or that he ever attended any meeting of BIRCA and in particular the April 7, 1967 meeting—all subsequently established as falsehoods. Tropiano and Grasso argue that *Bruton* v. *United States*, 391 U.S. 123 (1968), precluded the admission of Pellegrino's false exculpatory statements. The trial judge, in the absence of the jury, ruled that *Bruton* was inapplicable and thereafter, in the presence of the jury, permitted the Government to introduce those denials through one of its Special Agents as evidence of Pellegrino's guilty conscience. Prior to the admission of this testimony and again in its charge to the jury, the court was careful to instruct the jury that this testimony must be limited only to the charge against Pellegrino. Tropiano and Grasso argue that no instructions could be sufficient to limit the testimony in the minds of the jury to Pellegrino alone and that the admission denied them the right of confrontation within the scope of *Bruton*. We disagree.

Pellegrino's statement was completely exculpatory as to him and in no way inculpatory as to his co-defendants. As far as Pellegrino was concerned, the denials were offered not as hearsay for the truth of their contents but as a verbal act by Pellegrino contradicted by evidence subsequently placed before the jury from which a guilty

conscience might be inferred. When proven to be false, such an exculpatory statement "is circumstantial evidence of 'guilty consciousness' and has 'independent probative force.'" *United States* v. *Smolin*, 182 F.2d 782, 786 (2d Cir. 1950); *United States* v. *Farina*, 218 F.2d 62, 63 (2d Cir. 1954). Not every statement of a co-defendant is barred by *Bruton*. See *United States* v. *Lipowitz*, 407 F.2d 597 (3d Cir. 1969). Pellegrino's denials contained no accusation against his co-defendants and were not offered for that purpose (McCormick, *Evidence*, §225, pp. 460-461 (2d ed. 1954); *cf.*, Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 190-191 (1948)). Accordingly, a confrontation with Pellegrino was not required by the Sixth Amendment and the appellants have no basis to complain of an unconstitutional admission of evidence.

Referring to the bad reputation evidence, it is a truism that no defendant can be convicted upon his bad reputation or bad character alone. *Michelson* v. *United States*, 335 U.S. 469, 475 (1948). While bad reputation can never be the sole issue upon which a conviction rests, it may become relevant where one of the elements of the offense is the instillation of fear in the victim since such a reputation frequently conveys a tacit threat of violence. In order to establish a Hobbs Act extortion, the Government was compelled to show that the property was extorted by threatened violence or fear. Thus fear was one of the elements of the offense and bad reputation brought home to Caron by the appellants was relevant together with the other evidence to show that Caron acted out of fear. In fact, he testified that his fear was partially due to the very bad reputations of Tropiano and Grasso, and others testified that he looked worried and frightened. The appellants did not choose to

cross-examine Caron upon this issue, although the court in no way limited the scope of the potential cross-examination. Three times the Court cautioned the jury on the limited use of the bad reputation testimony, clearly explaining that the appellants were not to be tried on their bad reputations alone.[10] Likewise, the Court warned that Bertase's and Lockwood's testimony as to bad reputation given under Count 2 (which was subsequently dismissed) was to be considered only under Count 4—the conspiracy charge. Under the carefully limited instructions of the trial court, we find no error in the admission of the bad reputation evidence. *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963), *cert. denied,* 377 U.S. 953 (1964), *reh. denied,* 377 U.S. 1010 (1964); *cf., United States* v. *Kennedy,* 291 F.2d 457 (2d Cir. 1961).

Telephonic and Electronic Surveillance

The Connecticut State Police, as part of their investigation, on two occasions installed a tape recorder upon the Caron telephone. After the conference with Grasso on March 6, 1967, Caron and his wife visited State Police Lieutenant Donald Paige, who initiated an investigation of the alleged threats. As previously mentioned, the Carons testified that in March, 1967 they received many phone calls from Grasso and Pellegrino, in one of which Pellegrino told Mrs. Caron that her husband was playing with a "rough bunch of guys" and that she should have him "lay off before he got hurt." A tape recorder was installed in the Caron home on March 22, 1967 and remained there for two days, during which time Caron received one call from Grasso,

10 In fact, in his brief Tropiano concedes that "the Court did go to unusual lengths to shield the defendants against unfairness in this sector of the proofs."

which was recorded, and another one from Robert Reiss, manager of the Milford Rivet Company. Both of these recordings were introduced into evidence by the appellants. This recorder was removed on March 24th but, at the request of Mrs. Caron, it was reinstalled in her home on April 3rd and remained there until April 16th. During this period there were recorded on the tape, conversations between Caron and several members of BIRCA, referring to the various problems arising from Caron's business. The only portion of this recording which was made part of the record, was the portion of the conversation between Peter Bertase and Leonard Caron, a copy of which was given to the appellants' counsel before cross-examination. There was another tape recording of a conversation between Caron and Pellegrino which took place in Caron's house, which was unintelligible. With the exception of the Bertase conversation with Caron, the Government did not use any of the tapes at the trial and complied with its duty of full disclosure to counsel for appellants.

Appellants argue that the telephonic tape recordings invaded their Fourth Amendment rights, citing *Osborn* v. *United States,* 385 U.S. 323 (1966), *reh. denied,* 386 U.S. 938 (1967), and *United States* v. *White,* 405 F.2d 838 (7th Cir. 1969), *cert. granted,* 394 U.S. 957 (1969). *Osborn* has no application to this case and this Court in *United States* v. *Kaufer,* 406 F.2d 550 (2d Cir. 1969), *affirmed,* 394 U.S. 458 (1969), *reh. denied,* 395 U.S. 917 (1969), has refused to follow *White,* holding that the admission into evidence of consensual tape recording is constitutionally permissible. See *Rathbun* v. *United States,* 355 U.S. 107 (1957), *reh. denied,* 355 U.S. 925 (1958).

On another occasion, on April 7th, Caron took with him to the BIRCA meeting a portable one-way radio trans-

mitter equipped with an antenna in his sleeve, which was given to him by State Trooper David Paige for his protection. In spite of the fact that it was tested and found working early in the day at a range of 150 feet, Trooper Paige could not hear anything significant although he was only twenty feet away. The police testified that they heard nothing but static, which they suggested was due to the cinder block construction of the building, the malfunction of the transmitter, or the inclement weather. It is the appellants' position that the electronic surveillance of this meeting was likewise a violation of their Fourth Amendment rights. While the Fourth Amendment protects people rather than places (*Katz* v. *United States,* 389 U.S. 347 (1967)), it does not prohibit the transmission of a conversation of a defendant who knowingly exposes his statements to the public. Thus in this case the BIRCA meeting was open to all the members and Tropiano and Grasso had no justifiable expectation of privacy at this meeting which they could claim was constitutionally invaded in violation of the Fourth Amendment. *Hoffa* v. *United States,* 385 U.S. 293 (1966), *reh. denied,* 386 U.S. 951 (1967); *Lopez* v. *United States,* 373 U.S. 427 (1963), *reh. denied,* 375 U.S. 870 (1963).

The other objections to the surveillance were of a minor nature, which we find to be completely irrelevant.

Other Claims of Error

Among the many other claims of error, only a few merit consideration. Appellants assail the constitutionality of the Hobbs Act, the indictment, and the Court's charge. They assert that the Hobbs Act requires proof of completed extortion and if construed to cover attempted extortion, is constitutionally void for vagueness. The premise for this

claim is that the phrase "attempts or conspires so to do," as used in the Act, refers to interference with commerce and not to the word "extortion." One answer to this contention is that Caron's agreement not to solicit business in the Milford area was, in fact, evidence of completed extortion under the substantive Count 1. As to the conspiracy Count 4, the textual analysis of the statute would clearly embrace an attempt or conspiracy to interfere with commerce by extortion even though the attempt or conspiracy failed because the extortion was uncompleted. *United States* v. *Pranno,* 385 F.2d 387, 389-390 (7th Cir. 1967), *cert. denied,* 390 U.S. 944 (1968). Tropiano and Grasso also urge for the first time on appeal that Count 4 of the indictment was invalid because it charges a conspiracy to attempt to extort. The wording of Count 4 accuses the appellants of a conspiracy to violate the Act "by extortion and attempted extortion." The phrase "attempted extortion" is obviously surplusage, which the appellants failed to show in any way misled them. *Cf., United States* v. *Di Pietroantonio,* 289 F.2d 122, 124 (2d Cir. 1961). Since the sentences on Counts 1 and 4 were concurrent, appellants can hardly claim prejudicial error. *Lawn* v. *United States,* 355 U.S. 339, 362 (1958), *reh. denied,* 355 U.S. 967 (1958); *United States* v. *Kennedy, supra.*

The Court charged the jury that fear in Hobbs Act cases includes fear not only of violence but also of economic loss. Appellants assert that the inclusion of "economic loss" in the charge was erroneous because it indicates that the mere threat of undercutting prices by competition constitutes Hobbs Act extortion, which of course it does not. The charge, they claim, should have explained, among other things, that such threats were excluded from the ambit of the Act. It is too late in the day to contend that fear of

economic loss is excluded from the Hobbs Act (*Bianchi* v. *United States, supra; Nick* v. *United States,* 122 F.2d 660 (8th Cir. 1941), *cert. denied,* 314 U.S. 687 (1941), *reh. denied,* 314 U.S. 715 (1941)) and whatever theoretical merit there may be in appellants' contention as to competition, such an explanation was unnecessary upon the record of this case.

Finally, Pellegrino objects to the trial court's aider and abettor instructions, asserting that since he was not named in the indictment as an aider and abettor the charge was unnecessary and erroneous in that it was unclear as to its application to the substantive count or to the conspiracy count, and failed to explain that a conviction as an aider and abettor was impossible without prior proof of the commission of the crime by a principal. A defendant may be indicted for the commission of a substantive crime and convicted of aiding and abetting its commission although not named in the indictment as an aider and abettor (*United States* v. *Provenzano, supra; United States* v. *Washington,* 287 F.2d 819 (7th Cir. 1961), *cert. denied,* 366 U.S. 969 (1961); *Nassif* v. *United States,* 370 F.2d 147 (8th Cir. 1966); *Glass* v. *United States,* 328 F.2d 754 (7th Cir. 1964), *cert. denied,* 377 U.S. 983 (1964)), and it is unnecessary that the principal be first convicted or even identified. *Gray* v. *United States,* 260 F.2d 483 (D.C. Cir. 1958). Conspiracy to commit a substantive offense and aiding and abetting the commission of the same offense constitute separate and distinct crimes and a defendant may be convicted of both. *Nye & Nissen* v. *United States,* 336 U.S. 613 (1949); *United States* v. *Kensil,* 195 F. Supp. 115 (E.D. Pa. 1961), *affirmed,* 295 F.2d 489 (3d Cir. 1961), *cert. denied,* 368 U.S. 967 (1962). In its charge the trial court read to the jury the aiding and abetting statute and explained it in

clear and unambiguous language. We find no factual similarity to *United States* v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962), cited by Pellegrino, nor any error in the Court's charge upon this point or in any other respect. The other claims being similarly without merit, are hereby rejected.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1101

WILLIAM GRASSO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1224

RALPH TROPIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 418 F. 2d 1069.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1969. A petition for rehearing was denied on December 23, 1969. The petition for a writ of certiorari in No. 1101 was filed on January 22,

1970. In No. 1224, an extension of time until February 21 was obtained, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of a co-defendant's post-conspiracy exculpatory statement, which did not implicate petitioners and was offered only against that defendant, deprived petitioners of any Sixth Amendment rights (No. 1101).[1]

2. Whether the trial court erred in denying individual *voir dire* of the jurors (No. 1101).

3. Whether the trial judge erred in not disqualifying himself (No. 1101).

4. Whether the admission into evidence of a telephone conversation of a person who called the complaining witness at Grasso's suggestion, taped with the consent of the complaining witness, violated petitioners' constitutional rights (No. 1101).

5. Whether the acts proved constituted a violation of the Hobbs Act (Nos. 1101 and 1224).

6. Whether the evidence supports the verdict (No. 1224).

7. Whether petitioners received a fair trial (No. 1224).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioners were

[1] Each petitioner adopts the points of the other. In listing the petition number after the questions, we refer to the petition which primarily discusses the issue presented.

found guilty of conspiracy to violate and violation of the Hobbs Act (18 U.S.C. 1951). A co-defendant, Pellegrino, was convicted only of the substantive count. Petitioner Grasso (No. 1101) was sentenced to ten years' imprisonment on each count, the sentences to be served concurrently, and was fined $7,500 on the substantive count. Petitioner Tropiano (No. 1224) was sentenced to concurrent terms of twelve years' imprisonment and a $10,000 fine. The court of appeals affirmed both convictions (Pet. App. 1a–28a).

Petitioners Tropiano and Grasso and a third person were partners in the C & A Refuse Removal Company which collected rubbish in Milford, Connecticut. Co-defendant Pellegrino had an interest in the B & L Carting Corporation in Bridgeport, Connecticut. Leonard Caron, the complaining witness, conducted a rubbish removal business in the Bridgeport area.

In early 1967, Caron replaced the C & A Refuse Removal Company, the firm in which petitioners Grasso and Tropiano were partners, in servicing several stops in the Milford area. Shortly thereafter, Pellegrino arranged a meeting among himself, Caron, Grasso, and Tropiano. During this meeting Grasso told Caron to leave his accounts alone. If Caron did not cooperate, Grasso said, he would "push him out of Milford, way out if they needed to" (App. 182).[2] Tropiano told Caron that they "knew how to take care of" guys like him (*ibid.*).

[2] "App." refers to the appendix in the court below, a copy of which is on file with the Clerk of this Court.

Caron and his wife sought the aid of the Connecticut State Police, who installed a tape recorder in the Caron home for a two-day period, March 22–24, during which time Caron received one call from Grasso and one from the manager of the Milford Rivet Company, recordings of which were introduced by petitioners. The tape recorder was reinstalled during the period April 3–16. The only recording obtained during this time which was introduced as evidence was a portion of a conversation between Caron and a person who called at the instigation of Grasso to persuade Caron to give up the Milford Rivet stop (App. 1016, 965–967).

In late March, Caron obtained the Milford Rivet Company account which had formerly been serviced by petitioners' firm. Pellegrino arranged to have a special meeting of the Bridgeport Independent Refuse Collectors' Association (BIRCA), a loosely-knit trade and social organization of Bridgeport refuse dealers (App. 193). Both petitioners attended this meeting although they were not members of the group (App. 193). Caron testified that Grasso told the members that Caron should keep away from his customers. If the members did not cooperate in keeping Caron out, Grasso said, he would buy trucks, equip them with "muscle" and send them into Bridgeport to give the members a rough time (App. 245). Tropiano supported Grasso by telling the group that he had enough money to buy the trucks and furnish them with muscle (App. 245, 774). When Caron asserted his right to do business where he chose, Grasso told him that where he came from in New York, guys like Caron end up

either with their arms broken or in the river (App. 244). Grasso also stated that "you can stretch a rubber band just so far and its going to break and somebody is going to get hurt" (App. 245).[3]

In order to convince petitioners that her husband was not undercutting their service price, Mrs. Caron obtained a false purchase order from the manager of the firm and gave it to Pellegrino (App. 1297–1299). Later in April, Pellegrino told Caron that he was "a fool to consider servicing C & A's accounts" because he had a nice family and it would be a shame if something happened to his children on their way to school or to his wife (App. 259). The Carons took their children off the school bus and drove them to and from school until the end of the school year (App. 259, 1302–1303).

On July 4 Grasso arrived uninvited at Caron's home. Caron told Grasso that he would not give back the two accounts, but agreed not to solicit any more business in Milford and, specifically, not to solicit any of Grasso's customers (App. 260–261, 719–720).

ARGUMENT

1. In an interview with an FBI agent, Pellegrino denied being a member of BIRCA or knowing of its activities (App. 805). He denied attending the April 7 meeting of BIRCA at which the threats were made (App. 807). He also denied knowing petitioners or

[3] Various persons attending the meeting denied hearing remarks about "muscle" (App. 1418, 1499, 1527, 1582). Others admitted hearing the "rubber band" remark (App. 1246, 1270), and others referred to "trouble" at the meeting (App. 1044, 1597).

of their refuse business (App. 806). Pellegrino stated that he was unaware of any problem between Caron and petitioners (App. 807). Pellegrino did not take the stand at trial.

While recognizing that these statements were offered against Pellegrino alone and the jury was so instructed (App. 803–804), petitioners, relying on *Bruton* v. *United States*, 391 U.S. 123, contend the admission of such evidence violated their Sixth Amendment rights. They reason that, while the statements were offered as evidence of Pellegrino's "consciousness of guilt," any consciousness of guilt on his part must have been based on his consciousness of petitioners' guilt as well, since everyone agreed that at the April 7 meeting all Pellegrino did was to introduce petitioners. This reasoning overlooks the fact that, by denying all knowledge of the parties and issues involved, Pellegrino hoped to insulate himself from threats which he had made at other times (App. 259, 1296). More basically, the reasoning is erroneous in assuming that petitioners' right of confrontation was violated merely because evidence admitted against one defendant alone tended to support his guilt. It is undisputed that Pellegrino's statements in no way implicated petitioners. The fact that his actions in lying about the meeting might tend to convince the jury of his guilt did not convert his statements into evidence against petitioners. *Bruton* is thus inapposite, as the court below properly concluded (Pet. App. 20a–22a).

2. Articles linking petitioners with organized crime appeared in several Connecticut newspapers in Feb-

ruary 1968. Other articles and an interview with the Assistant United States Attorney appeared in March 1968, when the indictment was returned. Between March and October, the time of the trial, no further personal information concerning petitioners appeared in the press.

At trial, after denying motions for individual *voir dire* and for a change of venue, the trial judge proceeded to question the veniremen *en bloc*. On three occasions he asked whether they had heard or read anything about the case. Two of the veniremen remembered having read about the case, but in both instances the article was a recent one which merely concerned the assignment of the case for hearing (Tr. 42–44).

In determining the impact of prior adverse publicity, each case must turn on its own special facts. *Marshall* v. *United States*, 360 U.S. 310, 312. Here the complained of publicity occurred in February and March while the trial did not begin until October. Not infrequently, such a lapse of time effectively erodes the damaging statements from the minds of the jurors. *Beck* v. *Washington*, 369 U.S. 541, 555–558, rehearing denied, 370 U.S. 965; *Stroble* v. *California*, 343 U.S. 181. The matter of conducting an individualized *voir dire* rests in the discretion of the judge. *United States* v. *Bowe*, 360 F. 2d 1 (C.A. 2), certiorari denied, 385 U.S. 961. In view of the seven-month lapse of time that was present in this case, there was no abuse of that discretion here.

3. Nor did the trial judge err in refusing to disqualify himself for personal bias or prejudice. In an affidavit submitted under 28 U.S.C. 144, petitioner

Grasso alleged as grounds for his belief that the judge was biased that he had had a private conference with the Assistant United States Attorney before the hearing on bail, and had thereafter granted the government's request that bail be set at $25,000.

While a judge when presented with such an affidavit must accept the facts alleged as true, it is still his duty to pass on the sufficiency of the affidavit as a matter of law. *United States* v. *Bell,* 351 F. 2d 868 (C.A. 6), certiorari denied, 383 U.S. 947. To be sufficient, the affidavit "must show 'the objectionable inclination or disposition of the judge'; it must give 'fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.'" *Rosen* v. *Sugarman,* 357 F. 2d 794, 798 (C.A. 2). To be relevant, any such alleged personal bias must be of extrajudicial origin (*Tynan* v. *United States,* 376 F. 2d 761 (C.A. D.C.), certiorari denied, 389 U.S. 845), and an affidavit is insufficient if based on prior adverse judicial rulings or findings (*Barkan* v. *United States,* 362 F. 2d 158 (C.A. 7), certiorari denied, 385 U.S. 882). In the instant case the mere fact that the judge set the bond and presided at the bail hearing, thereby becoming familiar with petitioner's criminal record, did not disqualify him from presiding at a trial where a jury was to determine petitioner's guilt or innocence (*United States* v. *Kravitz,* 303 F. 2d 700 (C.A. 3), certiorari denied, 371 U.S. 922). And the fact that the Assistant United States Attorney had a private conference with the judge prior to the bail hearing, which meeting was devoted to a discussion of administrative matters, is, without more,

not indicative of personal bias or prejudice. *Willenbring* v. *United States,* 306 F. 2d 944 (C.A. 9); *Craven* v. *United States,* 22 F. 2d 605 (C.A. 1), certiorari denied, 276 U.S. 627; *United States* v. *Valenti,* 120 F. Supp. 80 (D. N.J.).

4. At the request of Caron, the State police placed a recording device on his home telephone. While several conversations between Grasso and Caron were recorded, the only recording the government put in evidence was one between Caron and Peter Bertase.[4] Since neither petitioner was a party to this conversation, there is no basis for a claim of violation of his Fourth Amendment right. *E.g., Alderman* v. *United States,* 394 U.S. 165, 171–176. Moreover, the right to record a telephone conversation where one of the parties consents was upheld in *Rathbun* v. *United States,* 355 U.S. 107. There is no reason to delay action on this petition pending decision of the different issue presented in *United States* v. *White,* No. 46, this Term, where the respondent himself was involved in the overheard conversations. See *United States* v. *Kaufer,* 406 F. 2d 550 (C.A. 2), affirmed, 394 U.S. 458.

5. The contentions, made in both petitions, that the acts proved did not constitute a violation of the Hobbs Act are without merit. The claim that there was not a sufficient connection with interstate commerce is answered by the wording of the Act itself, which provides that "[w]hoever in *any way or degree* obstructs, delays, or affects commerce or the move-

[4] Petitioner Grasso introduced a tape of a telephone conversation he had with Caron, which the police had recorded.

ment of any article or commodity in commerce" shall be guilty of violating this section (emphasis added). As this Court said in *Stirone* v. *United States*, 361 U.S. 212, 215, "[the] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." In the instant case, Caron employed trucks and containers manufactured by a corporation in Tennessee and purchased from the corporation's representative in New York. By interfering with Caron's right to solicit new customers, petitioners clearly affected interstate commerce by decreasing the number of containers and trucks Caron would need to service his customers.

Grasso contends that no "property" was extorted because all Caron relinquished was his right to solicit new accounts; he admits that the right to solicit new accounts is a "valuable" right, but disputes whether it is property (Pet. 34). The right to pursue a lawful business has, however, long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments. See *Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105; *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443; *Small* v. *United States*, 333 F. 2d 702 (C.A. 3). The right to solicit new customers is an integral part of the right to carry on a business. Petitioners obtained direct benefit from their acts because Caron, who had already taken over two of petitioner's accounts, agreed not only that he would not solicit any more business in the town but specifically not solicit any of petitioners' customers.

Clearly, Caron's right to solicit accounts in Milford constituted property within the Hobbs Act definition, and an offense thereunder was made out.

6. The gravamen of the lengthy petition in No. 1224 is that the jury should not have credited the testimony of Caron. The issue is discussed at considerable length in the opinion below which upheld the sufficiency of the evidence. Since petitioner Tropiano has filed a copy of his brief in the court of appeals, we are filing a copy of the government's brief which recites the evidence in greater detail than is appropriate in response to the petitions. We rely thereon, and on the opinion below (Pet. App. 3a–10a), in regard to the sufficiency of the evidence to support the convictions.

7. The claim that petitioners were denied a fair trial, particularly with respect to the trial judge's handling of testimony as to petitioners' reputations, is amply answered in the opinion below (Pet. App. 18a–20a) and in the government's brief in the court of appeals filed herewith. As there set forth (pp. 28–35), the trial judge took particular care to limit the possibility of prejudice to petitioners by declining to allow Caron to go into specifics as to petitioners' bad reputations and by its instructions on this issue. The other contentions are fully dealt with in the comprehensive opinion of the court of appeals, or are plainly frivolous.[5]

[5] For example, petitioners contend that their convictions both for conspiracy and a substantive count based upon the same conduct constituted impermissible double punishment, notwithstanding that they received concurrent sentences.

CONCLUSION

It is accordingly respectfully submitted that the petitions for writs of certiorari should be denied.

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MARCH 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970